IN THE

United States Circuit Court of Appeals

FOR THE SIXTH CIRCUIT

No. .....

THE CITY OF NORWALK, OHIO,
Defendant-Appellant.

vs.

THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,
Plaintiff-Appellee.

Appeal from the District Court of the United States, Northern District of Ohio, Western Division

---

TRANSCRIPT OF RECORD

REX F. BRACEY, *Norwalk, Ohio,*
G. RAY CRAIG, *Norwalk, Ohio,*
E. G. MARTIN, *Norwalk, Ohio,*
W. A. EVERSMAN, *Toledo, Ohio,*
WILLIAMS, EVERSMAN & MORGAN,
Toledo, Ohio,
Attorneys for Appellant

MILBANK, TWEED, HOPE & WEBB, *New York City,*
TRACY, CHAPMAN & WELLES, *Toledo, Ohio,*
Solicitors for Appellee

GEORGE D. WELLES, *Toledo, Ohio,*
EARL F. BOXELL, *Toledo, Ohio,*
Of Counsel for Appellee.

INDEX

	Page
Caption	1
Bill of Complaint	2
Amendment and Supplement to Bill of Complaint	16
Affidavit of Earl F. Boxell	20
Temporary Restraining Order	22
Bond	25
Orders Continuing Injunction	26, 27
Motion	28
Order	29
Second Amendment and Supplement to Bill of Complaint	30
Exhibit A—Ordinance Passed July 30, 1890	35
Exhibit B—Ordinance Passed Oct. 7, 1890	36
Answer	37
Third Amendment and Supplement to Bill of Complaint	46
Answer to Third Amendment and Supplement to Bill of Complaint	47
Narrative Statement of Testimony Under New Equity Rule 75 and in Compliance with Rule 15 of the United States Circuit Court of Appeals for the Sixth Circuit	49
Recapitulation of Offering and Admission of Exhibits	207
Order	209
Memorandum Opinion	211
Permanent Injunction	240
Petition for Appeal	243
Assignments of Error	243
Order Allowing Appeal	251
Citation	252
Order Extending Time	253
Bond on Appeal	253
Orders Extending Time	254-257
Affidavit for Plaintiff Upon Taxation of Costs	258
Order Extending Time	268
Stipulation re Certification of the Record	268
Order	269
Praecipe for Transcript of Record on Appeal	270
Notice of Praecipe for Transcript of Record on Appeal	272
Order Extending Time	272
Defendant's Affidavit Upon Taxation of Costs	273
Certificate of Clerk	570

PLAINTIFF'S TESTIMONY

Witness	Di.	Cr.	Re-di.	Re-cr.
Suhr, Charles	50	59	64	65
			65	65
Foster, Burton P.	66	70	72	
Taylor, Clarence J.	76	79	82	
Frederici, Richard Earle	83	85	87	
Kreider, John F.	88	92	93	
Turkle, Dwight E.	93	97	101	
Fauver, L. B.	101	103		
Pruner, W. R.	106	107		
Boxell, Earl F.	114	115		
Insull, William	116	119	125	125
Heath, Clinton	125			
Greenfelder, Alfred V.	127	130		
Nester, John A.	131	132		

DEFENDANT'S TESTIMONY

Lawrence, C. B.	135			
Fifner, George W.	136			
Cole, Fred B.	137			
Webster, Burt P.	138	140	145	146
Suhr, Charles	146	147		
Irvin, M. G.	148	153		
	158	163	166	166
Spengler, Warren D.	167	171	177	
Preston, B. F.	178	179		

PLAINTIFF'S REBUTTAL TESTIMONY

Fauver, L. B.	179		
Yeager, Leland E.	184		
Christian, Robert L.	191	193	
Ruffing, A. A.	194	195	196
Recalled.	200		
Wolf, L. J.	196	198	199

DEFENDANT'S SURREBUTTAL TESTIMONY

Martin, Edgar G.	201	202
Tucker, C. E. (Deposition of)	205	
Berry, John R. (Deposition of)	206	

PLAINTIFF'S EXHIBITS

Page

1—Stipulation 277
2—Stipulation 281
3—Articles of Incorporation of Incandescent Light & Power Co. 282
4—Deed of Assignment from Incandescent Light & Power Co. to F. H. Jones and J. W. Foster, Assignees 285
5—Deed from Incandescent Light & Power Co. to Geo. P. Jones et al. 287
6—Articles of Incorporation of Northern Electric Co. 289
7—Deed from George P. Jones et al. to Northern Electric Co. 291
8—Articles of Incorporation of Norwalk Gas and Electric Co. 294
9—Deed from Northern Gas and Electric Co. to Norwalk Gas and Electric Co. 296
10—Organization and Franchise of Cleveland and Southwestern Traction Co. 299
11—Agreement Between Norwalk Gas and Electric Co. and Cleveland and Southwestern Traction Co. 309
12—Organization and Franchise of Cleveland Southwestern and Columbus Railway Co. 313
13—Articles of Incorporation of Cleveland Southwestern Railway and Light Co. 327
14—Joint Application of Victor Emanuel and Cleveland Southwestern Railway and Light Co. for authority to Purchase and Sell Electric Lines .. 329
14A—Agreement. 332
15—Order of Public Utilities Commission re Joint Application. 333
16—Bill of Sale, Cleveland Southwestern Railway and Light Co. to Victor Emanuel 335
17—Assignment by Cleveland Southwestern Railway and Light Co. to Victor Emanuel 338
18—Quit Claim Deed from Cleveland Southwestern Railway and Light Co. to Victor Emanuel 342
19—Re Joint Application of Victor Emanuel and Ohio Electric Power Co. for Authority to Purchase and Sell 344

Page

20—Order re Joint Application of Victor Emanuel and Ohio Electric Power Co. for Authority to Purchase and Sell..... 348
21—Articles of Incorporation of Ohio Electric Power Co. 351
22—Bill of Sale, Victor Emanuel to Ohio Electric Power Co. 355
23—Quit Claim Deed from Victor Emanuel to Ohio Electric Power Co. 358
24—Assignment from Victor Emanuel to Ohio Electric Power Co. 360
25—Quit Claim Deed from Victor Emanuel to Ohio Electric Power Co. 363
26—Order of Confirmation 365
27—Certified Copy, Deed of Special Master 370
27½—Deed, Cleveland Southwestern and Columbus Railway Co. to Cleveland Southwestern Railway and Light Co. 375
28—Mortgage and Deed of Trust, Ohio Electric Power Co. to Seaboard National Bank 379
29—Supplemental Mortgage, Ohio Electric Power Co. to Seaboard National Bank 412
30—Certificate, C. E. Bramble 423
31—Affidavit, C. E. Bramble 425
32—Certificate, C. L. Clune 428
33—Excerpt from Council Records, July 25, 1890 430
34—Excerpt from Council Records, Oct. 7, 1890 433
35—Ordinance, Passed Oct. 7, 1890 434
36—Ordinance, Passed May 6, 1901 435
37—Excerpt from Council Records, Jan. 4, 1916 436
38—Ordinance, Passed July 1, 1924 438
39—Excerpt from Council Records, Sept. 1, 1925 442
40—Resolution, Passed Sept. 1, 1925 443
41—Excerpt from Council Records, March 23, 1926. 444
42—Resolution, Passed March 23, 1926 445
43—Excerpt from Council Records, April 6, 1926 446
44—Excerpt from Council Records, May 18, 1926 448
45—Resolution, Passed May 18, 1926 449
46—Resolution, Passed Jan. 13, 1930 450
47—Petition in Court of Common Pleas 451
51—Letter, City of Norwalk to Ohio Electric Power Co. 457
52—Letter, City of Norwalk to Ohio Electric Power Co. 458

Page

53—Letter, City of Norwalk to Ohio Electric Power Co. 459
54—Letter, City of Norwalk to Ohio Electric Power Co. 460
55—Letter, City of Norwalk to Ohio Electric Power Co. 460
56—Letter, City of Norwalk to D. E. Turkle..... 461
57—Letter, City of Norwalk to Ohio Electric Power Co. 462
58—Letter, City of Norwalk to Ohio Electric Power Co. 463
59—Letter, City of Norwalk to Ohio Electric Power Co. 464
60—Letter, City of Norwalk to Ohio Electric Power Co. 464
61—Letter, City of Norwalk to Ohio Electric Power Co. 465
62—Letter, City of Norwalk to Local Telephone Co.. 466
63—Letter, City of Norwalk to Ohio Electric Power Co. 467
64—Letter, City of Norwalk to Ohio Electric Power Co. 467
65—Letter, Ohio Electric Power Co. to City of Norwalk 468
66—Letter, City of Norwalk to Ohio Electric Power Co. 469
67—Letter, City of Norwalk to Ohio Electric Power Co. 470
68—Letter, City of Norwalk to Ohio Electric Power Co. 471
69—Letter, L. L. Stahler to Max G. Irvin..... 471
70—Excerpt from Council Records, Feb. 4, 1896... 472
71—Stipulation 473
76—Letter, Fauver & Cheney to Seibert & Riggs... 478
77—Letter, unsigned to Frank H. Ginn..... 480
78—Circular re First Mortgage Gold Bonds, Series A 489
79—Circular re First Mortgage Gold Bonds, Series B 496
80—Excerpt from Norwalk Reflector-Herald, Nov. 21, 1914 503
81—Letter, Cleveland Southwestern and Columbus Railway Co. to City of Norwalk..... 510

Page

82—Circular, Ohio Electric Power Co to Their Customers 512
83—Certification, re Mortgage and Deed of Trust of July 1, 1924..... 513
84—Excerpt from Council Records, March 25, 1913. 520

DEFENDANT'S EXHIBITS

A—Photograph 521
B—Initiative Petition to Submit Ordinance to Electors and Result of Election..... 522
D—Reproduction Cost New..... 525
E—Stipulation. 529
F—Petition in Case of Cutter vs. Incandescent Light and Power Co., Common Pleas, Huron County.. 530
G—Contract Between Northern Electric Co. and City of Norwalk..... 534
H—Form of Contract Between City of Norwalk and Cleveland and Southwestern Traction Co..... 541
I—Excerpt from Council Records, April 18, 1905... 551
J—Excerpt from Council Records, Jan. 20, 1914... 553
K—Photograph, Pole of Ohio Electric Power Co... 554
L—Photograph, Pole of Ohio Electric Power Co... 555
M—Photograph, Pole of Ohio Electric Power Co... 556
N—Photograph, Pole of Ohio Electric Power Co... 557
O—Photograph, Pole of Ohio Electric Power Co... 558
P—Valuation Distribution System, Ohio Electric Power Co. 559
Q—Reproduction Cost New..... 560
T—Preliminary Report of Receiver in General Electric Co. vs. Cleveland Southwestern and Columbus Railway Co..... 561
U—Lease, Frank Lake and Georgia Rexford to Norwalk Incandescent Light Co..... 567

Proceedings in United States circuit court of appeals, sixth circuit.. 571
Minute entry of argument and submission..... 571
Decree 571
Opinion, Moorman, J..... 572
Petition for rehearing..... 577
Appendix "A"—Excerpts from pleadings in case of Old Colony Trust Co, vs. City of Omaha..... 621
Appendix "B"—Affidavits..... 628
Order denying petition for rehearing..... 639
Clerk's certificate..... 639
Order allowing certiorari..... 640

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

CAPTION

United States of America, Northern District of Ohio, Western Division, ss.

Record of the proceedings of the District Court of the United States within and for the Western Division of the Northern District of Ohio, in the cause and matter hereinafter stated, the same being finally disposed of at a regular term of said court begun and held in the City of Toledo, in said district, on the last Tuesday in April, being the 28th day of said month, in the year of our Lord one thousand nine hundred and thirty-one and of the Independence of the United States of America the one hundred and fifty-fifth, to-wit: on Saturday, the 27th day of June, A. D. 1931.

Present: Honorable George P. Hahn, United States District Judge.

No. 1040. In Equity.

The Equitable Trust Company of New York.

vs.

City of Norwalk, Ohio.

Said action was commenced on the 3rd day of January, A. D. 1930, and proceeded to final disposition at the term and day above written, and during the progress thereof pleadings and papers were filed, process was issued and returned, and orders of the court were made and entered in the order and on the dates hereinafter stated, to-wit:

BILL OF COMPLAINT

(Filed Jan. 3, 1930)

Now comes the plaintiff, The Equitable Trust Company of New York, and complaining of defendant, for its cause of action against it, says:

1. The Equitable Trust Company of New York is now, and has been for many years, a corporation duly organized and existing under and by virtue of the laws of the State of New York, for the purpose of engaging in a general banking and trust business, in which business it has been engaged since its incorporation, and is a citizen and resident of the State of New York.

2. Defendant, The City of Norwalk, is and was at all times hereinafter mentioned, a municipal corporation in the State of Ohio, and is the county seat of Huron County, and it is a citizen and resident of the Western Division of the Northern District of said state.

3. This suit is one between citizens of different states. The amount involved, exclusive of interest and costs, exceeds the sum or value of Five Thousand ($5,000.00) Dollars. This suit involves a controversy arising under the Constitution and laws of the United States.

4. The Equitable Trust Company of New York by merger with it in 1929 of The Seaboard National Bank of the City of New York, formerly a banking corporation duly organized and existing under the laws of the United States, duly accomplished by appropriate action of said corporations' respective boards of directors and stockholders, has acquired and succeeded to all of the properties and rights formerly held by said The Seaboard National Bank of the City of New York, and particularly to all those properties and rights formerly acquired and held by said The Seaboard National Bank of the City of New York, under and by virtue of a certain mortgage and deed of trust, dated July 1, 1924, and a supplemental mortgage to said mortgage and deed of trust, dated May 25, 1925, executed and delivered by the Ohio Electric Power Company to said The Seaboard National Bank of the City of New York, as trustee, to secure First Mortgage Gold Bonds of the Ohio Electric Power Company, as hereinafter set forth.

5. The plaintiff is informed and believes, and therefore avers, that the Ohio Electric Power Company is a corporation organized and existing under the laws of Ohio, for the purpose, among others, of furnishing consumers with electric power, light and energy, and

owning, maintaining and operating all equipment necessary therefor, in which business said company is and has been engaged in the City of Norwalk and elsewhere since its incorporation in 1924. Said company, prior to July 1, 1924, in the proper exercise of its powers under the laws of the State of Ohio, and in accordance with resolutions duly passed by its board of directors and its stockholders at respective meetings thereof duly called and held, duly authorized the issue of First Mortgage Gold Bonds in one or more series, maturing at such dates and bearing interest at such rates, respectively, as the board of directors of the company should determine, and as should be approved by the trustee; such bonds to be coupon bonds, registerable or non-registerable as to principal, as the board of directors of the company might determine, and/or registered bonds without coupons, to be executed under the corporate seal of the company, and to be signed in its corporate name by its president or vice-president, impressed with its corporate seal, and attested by its secretary or an assistant secretary, and authenticated by the certificate of the trustee, and the amount of the bonds so to be made, issued, authenticated and delivered to be not limited except that no further bonds should be issued at any time if the total amount of bonds to be outstanding after such issue would in any event exceed the then limit of indebtedness, if any, of the company permitted by law. By the terms of said bonds the Ohio Electric Power Company promised to pay in the case of coupon bonds to the bearer thereof, and in the case of registered bonds, to the registered owner thereof, or his assigns, at the office or agency of the company, the principal sum thereof at the maturity thereof, with interest as specified therein, in gold coin of the United States of America of the standard of weight and fineness, as it then existed, upon the presentation and surrender thereof. The form and tenor of said bonds are set forth specifically in the mortgage and deed of trust above referred to.

6. The Ohio Electric Power Company, on or about July 1, 1924, being thereunto duly authorized by action of its board of directors, and its stockholders, pursuant to the laws of the State of Ohio in such case made and provided, duly executed and delivered to The Seaboard National Bank of the City of New York, as trustee, its certain mortgage and deed of trust, dated July 1, 1924, wherein and whereby in order to secure the payment both of the principal and interest of all such bonds as above stated which might thereafter be issued and out-

standing, and in order to secure the performance and observance of all the covenants and conditions contained in said mortgage and deed of trust, said company granted, bargained, sold, released, conveyed, assigned, transferred, pledged, set over and confirmed to The Seaboard National Bank of the City of New York, as trustee, and to its successor, or successors, in said trust, and to its and their assigns forever, all the various properties of the Ohio Electric Power Company therein described, and by supplemental mortgage, dated May 25, 1925, executed and delivered by said Ohio Electric Power Company granted, bargained, sold, released, conveyed, assigned, pledged, set over and confirmed to said The Seaboard National Bank of the City of New York, as trustee, in like manner and for the same purposes as expressed in said mortgage and deed of trust, all of the properties, franchises and rights of said Ohio Electric Power Company located in the City of Norwalk, County of Huron, and State of Ohio, including especially all of said company's contracts, franchises, grants, rights and privileges which said company then had or might have in the City of Norwalk, or in connection with the conduct of an electric light, heat and power business in said city. Plaintiff as hereinabove stated by merger with it of The Seaboard National Bank of the City of New York duly acquired all the right, title and interest of said The Seaboard National Bank of the City of New York in and to the properties conveyed by said mortgage and deed of trust, and supplemental mortgage thereto, and has duly accepted the trust therein created, and plaintiff then was, and is now fully authorized and empowered to take and hold in trust the property thereby conveyed and to execute the trust imposed on it under and by virtue of the provisions thereof.

Said mortgage and deed of trust and supplemental mortgage thereto were duly filed for record with the recorder of Huron County, Ohio, on the 19th day of June, 1925, at 11:20 o'clock A.M., and were thereafter duly recorded respectively in the Huron County, Ohio, Mortgage Records at Vol. 95, pages 41/74, inclusive, and Vol. 95, pages 75/8, inclusive. And plaintiff is informed and believes, and therefore avers, that it was well known in the City of Norwalk that said mortgage and supplemental mortgage in favor of plaintiff covered all the franchises, rights and privileges, as well as other property of the Ohio Electric Power Company in the City of Norwalk.

7. The Ohio Electric Power Company, after the

execution and delivery of said mortgage and deed of trust, duly made and executed bonds of the initial Series A as therein specified and of other series described and provided for in the mortgage and deed of trust of the aggregate face value of Two Million One Hundred Thousand Dollars ($2,100,000.00), all of which bonds were duly certified by the plaintiff or its predecessor, The Seaboard National Bank of the City of New York, as provided in said mortgage and deed of trust, and all of said bonds were duly issued by the Ohio Electric Power Company in accordance with the provisions of said mortgage, and, as plaintiff is informed and believes, for valuable consideration, and, on information and belief, said bonds are now outstanding in the hands of numerous and various persons and corporations who are the owners and holders thereof for value, and plaintiff is informed and believes, and therefore avers, that all of said bonds so issued are now in all respects valid outstanding obligations of the Ohio Electric Power Company, and are entitled to the benefit and security of said mortgage and deed of trust and said supplemental mortgage thereto.

8. Plaintiff is informed and believes, and therefore avers, that the Ohio Electric Power Company is now, and at and prior to the execution and delivery of said mortgage and deed of trust and supplemental mortgage thereto and the issuance of said bonds was, occupying the streets, alleys and public places in the City of Norwalk with its poles, lines, conduits and other electrical equipment and is and at said times was engaged in the business of furnishing electrical current for lighting, heat and power for domestic and commercial purposes, by virtue of rights under a perpetual franchise so to use the streets, alleys and public places of the City of Norwalk, granted by the State of Ohio, as more particularly hereinafter set forth, and agreed to and concurred in by the City of Norwalk, and under the rights and perpetual franchise so acquired said company has full and complete authority to maintain all such poles, lines, conduits and equipment and to operate the same for the furnishing of electricity, as stated above. Said perpetual franchise and rights are included with all of the tangible property of the Ohio Electric Power Company, conveyed by said company by said mortgage and deed of trust, and supplemental mortgage thereto, to The Seaboard National Bank of the City of New York, to all the title and rights of which this plaintiff succeeded and now holds.

9. Plaintiff is informed and believes, and avers, that the Ohio Electric Power Company acquired and holds its perpetual franchise and rights to maintain and operate its poles, lines, conduits and other electrical equipment in the streets, alleys and public places of the City of Norwalk for the purpose of furnishing electrical current for public, domestic and commercial light, heat and power purposes through and by virtue of various and sundry intermediate conveyances and assignments from its predecessors who were successors of The Incandescent Light & Power Company and of the Northern Electric Company. The Incandescent Light & Power Company was duly incorporated under the laws of the State of Ohio then existing on March 7, 1891, for the purpose of furnishing electric light and power to the citizens of Norwalk and vicinity. The Northern Electric Company was duly incorporated under the laws of the State of Ohio then existing on May 17, 1895, for the purpose of manufacturing and producing electricity for light, heat and power purposes. Said companies by virtue of their respective incorporations acquired from the State of Ohio under the provisions and terms of Sections 3471-A, 3454 and 3461 of the Revised Statutes of Ohio, which were then in full force and effect, perpetual franchises to occupy and use the streets, alleys and public places of the City of Norwalk for the purposes of constructing, maintaining and operating poles, wires, conduits and other electrical equipment therein for the distribution of electric current to the City of Norwalk, and the inhabitants thereof, for public, domestic and commercial light, heat and power purposes, subject only to the right of said municipality to agree with said companies upon the mode of use of its streets, alleys and public places, and in the event of failure to agree, to have said mode of use determined by the Probate Court of Huron County, Ohio.

Plaintiff is further informed and believes, and therefore avers, that said The Incandescent Light & Power Company after its incorporation acquired all of the property and rights of the Norwalk Incandescent Light Company, a partnership, which operated an electric light and power plant and distributing system in Norwalk, Ohio, from about October 7, 1890, until after the incorporation of said The Incandescent Light & Power Company, as hereinafter shown; and thereafter all of said property and rights were transferred by proper conveyance and assignment to the Northern Electric Company. The Northern Electric Company

thereupon, in reliance upon the rights so acquired and upon its grant from the State of Ohio, and the perpetual rights thereby conferred, proceeded during the year 1895 to construct and erect a large and expensive plant in said city for the generation of electricity, sufficient in capacity to provide for all the requirements of said City of Norwalk and its inhabitants for electric current both for public and private purposes, and forthwith during the year 1895, and thereafter, with the approval, consent and agreement of said municipality, proceeded to erect, construct, improve, maintain and use poles, wires, conduits and other equipment on practically all of the public streets, alleys and public places of said city, and further in reliance upon said grant from the State of Ohio and the agreement and consent of said city, operated a modern plant for the generation and distribution of electric current in said city, and furnished electric current to said city and all of the inhabitants thereof, who desired to receive the same under the rules and regulations of such company.

10. Plaintiff is informed and believes, and therefore avers, that the Ohio Electric Power Company is now the owner and holder by purchase and assignment of all of the property, franchises and rights formerly owned by the Northern Electric Company, which property, franchises and rights have been conveyed and assigned from said the Northern Electric Company through its various successors to said Ohio Electric Power Company; and the Ohio Electric Power Company and all of its predecessors in title, including said The Northern Electric Company, have continuously maintained said poles, wires, conduits and electrical equipment, and have continuously operated the same under the franchise rights acquired from the State of Ohio, as above stated, and said company and all of its said predecessors, have at all times since the incorporation of the Northern Electric Company in 1895, continued in the occupancy of the streets, alleys and public places of the City of Norwalk with their said poles, wires, conduits and other equipment, in open reliance upon said franchise rights acquired from the State of Ohio, and with the knowledge, acquiescence, consent and agreement of the said City of Norwalk, both to the continued occupancy of said streets, alleys and public places therein, and to the various transfers, conveyances and assignments of the properties and franchise rights of said The Northern Electric Company to and through its various successors down to and including the Ohio Elec-

tric Power Company. The Ohio Electric Power Company, and its said predecessors at various times following their respective purchases of the properties and franchises of their respective predecessors, in reliance upon the perpetual franchise rights granted by the State of Ohio, and the consent, acquiescence and agreement of said City of Norwalk, have each expended large sums of money in expanding, improving and bettering said plant and distribution system within said city in order to render more efficient service to said city and its inhabitants. The tangible properties and the said perpetual franchise rights of the Ohio Electric Power Company, in the City of Norwalk are each of a value far in excess of Five Thousand ($5,000.00) Dollars. Said perpetual franchise rights acquired from the State of Ohio were granted without any qualification thereof as to duration or assignability, and were in fact perpetual and assignable, and the same now remain in full force and effect as property and contractual rights of the Ohio Electric Power Company, with the State of Ohio, and said franchise rights form an essential and indispensable part of the security afforded by said mortgage and deed of trust and supplemental mortgage thereto, executed and delivered by the Ohio Electric Power Company to this plaintiff's predecessor, The Seaboard National Bank of the City of New York, as trustee, and as plaintiff is informed and believes, and therefore avers, the present holders of the bonds secured by said instruments relied upon said franchise and the security thereof in acquiring and owning said bonds.

11. Plaintiff is informed and believes, and therefore avers, that the defendant, City of Norwalk, by resolution of its city council, passed March 23, 1926, in violation of the perpetual franchise rights of the Ohio Electric Power Company and the rights of this plaintiff and of said bondholders to the security of said franchise rights by reason of said mortgage and deed of trust and supplemental mortgage thereto, asserted that the Ohio Electric Power Company was maintaining and operating its poles, wires, conduits, and other equipment in the various public streets, alleys and public places in said city, without any franchise, license, or authority from said city, and the said city ordered the Ohio Electric Power Company within thirty (30) days to remove and take from all the public streets, alleys and other public places in said City of Norwalk, Ohio, its poles, wires, lines, guy wires, braces, cross-arms, and all other equipment then located in said streets, alleys and other

public places. Said City of Norwalk thereafter made complaint thereof to Edgar G. Martin, as prosecuting attorney of Huron County, Ohio, and thereby requested Edgar G. Martin as such prosecuting attorney to take such legal steps as were provided under the laws of Ohio in quo warranto to oust said Ohio Electric Power Company from the use and enjoyment of said liberty, franchises and privileges.

12. Plaintiff is informed and believes, and therefore avers, that thereafter said Edgar G. Martin in the name of the State of Ohio on the relation of Edgar G. Martin, prosecuting attorney of Huron County, Ohio, filed in the Court of Appeals of Huron County, Ohio, a petition in quo warranto against the Ohio Electric Power Company, alleging that said company had taken charge and possession of as of right and was then using the public streets, lanes, avenues and other public places of the City of Norwalk for the erection and maintenance of poles, wires, guy wires and electrical equipment for the purpose of supplying private individuals, firms and corporations of said city with electricity for commercial and private lighting purposes, and that said company had assumed and was using said franchise rights and privileges without the consent and authority of the State of Ohio or the City of Norwalk, and prayed that said company be ousted from using the same. Thereafter, such proceedings were had in said suit that said Court of Appeals, on June 7, 1928, entered its judgment and order ousting the Ohio Electric Power Company from further use and occupancy of the public streets, lanes, alleys, avenues and other public places of said City of Norwalk for the erection and maintenance of its poles and other electrical equipment for the purpose of supplying private individuals, firms and corporations of said city with electricity for commercial and private lighting purposes and from exercising any and all said franchise rights and privileges within the City of Norwalk, all from and after the first day of September, 1928; to which decree, judgment and order of ouster, the Ohio Electric Power Company duly excepted; and thereafter said Ohio Electric Power Company duly filed its petition in error in the Supreme Court of Ohio, averring that there was error in said proceedings of said Court of Appeals prejudicial to the plaintiff in error, and praying that said judgment and decree might be reversed and final judgment entered in favor of said the Ohio Electric Power Company; and the Supreme Court of Ohio thereafter on June 12, 1929, entered its judgment

affirming the judgment of said Court of Appeals against the Ohio Electric Power Company.

Plaintiff is informed and believes, and therefore avers, that after the passage of the said resolution or ordinance by the city council of the City of Norwalk on March 23, 1926, an agreement or understanding was arrived at between the representatives of the Ohio Electric Power Company and the officials of said city, wherein it was agreed and understood that, pending a determination of the controversy as to the right of the company to use the streets for its poles, wires and other equipment, the city would not interfere with or molest the company in its use thereof or disturb or remove any of the company's property, and the company, on its part, would not extend its equipment or services or accept business from new customers; but that, in spite of such agreement or understanding, and the adherence and performance thereof by the company, the city did in fact commence by physical force to remove the wires, poles and other equipment of the company from the streets in a manner dangerous to the public safety, while such controversy was still pending; and that the company was obliged to obtain and did obtain a temporary injunction from the courts of the State of Ohio to cause discontinuance of such acts of physical violence on the part of the city, pending the outcome of the quo warranto suit above referred to.

13. Plaintiff is informed and believes, and therefore avers, that the city council of the defendant, the City of Norwalk, on July 30, 1890, passed an ordinance and amended the same on October 7, 1890, by which ordinance and amendment thereto said city purported to grant to The Norwalk Incandescent Light Company, a partnership, its successors and assigns, a franchise and right of way on the streets, alleys and public ways of said city for the purpose of erecting, maintaining and operating thereon an electric light and power distribution system for a period of twenty years.

Plaintiff avers that said ordinance so passed and amended by the council of the defendant, the City of Norwalk, was wholly ineffective and void as a grant of a franchise of said character, but that same in legal effect constituted and was a tender of an agreement by said city as to the mode of use of its streets, alleys and public places to the Norwalk Incandescent Light Company, its successors and assigns, under and in pursuance of statutes of the State of Ohio which were then in full force and effect, and which permitted cities to make

agreements as to the mode of use of streets, alleys and public places by holders of electric light and power franchises. Said tender of agreement as to the mode of use of the streets of said city was accepted by said Norwalk Incandescent Light Company, and by its successors and assigns, including the Ohio Electric Power Company, which has succeeded to and now holds any and all rights of said Norwalk Incandescent Light Company under said ordinance and amendment thereto. Said Norwalk Incandescent Light Company and all of its successors, including the Ohio Electric Power Company, have at all times since continued to comply with and abide by said agreement as to the mode of use of said streets, and said company is now complying with and abiding by it. Plaintiff avers that said City of Norwalk did not at any of the times herein mentioned possess the power to limit the duration of the use of its streets, alleys and public places to a period of twenty years, or any other period under the guise of agreement as to mode of use thereof, but plaintiff further avers that even if said city had the right to limit its agreement as to mode of use to twenty years, which plaintiff does not admit, but expressly denies, said city and the Ohio Electric Power Company and its predecessors, since the expiration of said twenty-year period, have at all times continued to agree upon the said mode of use of the streets, alleys, and public places of said city by said company and its predecessors.

14. Plaintiff avers, on information and belief, that said perpetual franchise rights acquired by The Incandescent Light & Power Company and the Northern Electric Company upon their incorporations in 1891 and 1895, respectively, were subject only to the right of said City of Norwalk to agree with said companies upon the mode of use of the streets, alleys and public ways of said city, and in case they could not agree, then to have the mode of use directed by the Probate Court of Huron County; but this plaintiff further avers that there has never been any disagreement between said City of Norwalk and said companies, and/or any of their successors in title to said franchises, including the Ohio Electric Power Company, as to the mode of use, but that upon the contrary, said City of Norwalk has at all times since the incorporation of The Incandescent Light & Power Company and the Northern Electric Company in 1891 and 1895, respectively, consented, acquiesced and agreed with the said company and its successors, including the Ohio Electric Power Company, as to the mode of use of said streets, alleys and public ways, and that when

the city council of said City of Norwalk in 1926 passed said resolutions of ouster and authorized and directed the institution of quo warranto proceedings against the Ohio Electric Power Company, there was not then any disagreement as to the mode of use of said streets, alleys and public ways, but that said city based its claims and order that the Ohio Electric Power Company should be ousted solely upon the ground that said company was without any right, authority or license to occupy and use said streets, alleys and public places for its electrical distribution system. Plaintiff avers that the occasion has never arisen for the determination of the mode of use by the Probate Court, and that the City of Norwalk has never applied to the Probate Court for a direction as to the mode of use of its streets, alleys and public places by the Ohio Electric Power Company, or any of its predecessors.

15. Plaintiff is informed and believes, and therefore avers, that the electrical generation and distributing plant, poles, lines, wires, conduits, and other equipment of the Ohio Electric Power Company, in and around the City of Norwalk are modern and efficient and all of said system as a going and operating concern has a value of not less than One Hundred and Forty Thousand ($140,000.00) Dollars, and this value is contributed to largely by the fact that numerous individuals, partnerships and corporations in the said City of Norwalk depend upon said Ohio Electric Power Company for the furnishing to them of electric current for light, heat and power. As a going concern said electrical distribution system is a large and substantial portion of the security held by this plaintiff, as trustee, under said mortgage and deed of trust and supplemental mortgage thereto to The Seaboard National Bank of the City of New York to all the rights of which this plaintiff has succeeded and now possesses, and if the Ohio Electric Power Company is compelled to dismantle and remove from the streets, alleys and public places of said city all of its poles, wires, conduits and other equipment for the distribution of electric current, and is prevented from thereafter exercising its perpetual franchise rights in the streets, alleys and public places of said city, its said plant and distribution system will be depreciated in value 90% or more and in fact will have only a junk value, and this plaintiff and the numerous owners and holders for value of the bonds issued by the Ohio Electric Power Company under said mortgage and deed of trust and supplemental mortgage thereto will be deprived and shorn of

a substantial portion of their security, all without having had their day in court.

Said perpetual franchise rights possessed by the Ohio Electric Power Company constitute a contract with the State of Ohio, and said rights are property the protection of which is guaranteed by the Constitution of the United States.

Under said mortgage and deed of trust and supplemental mortgage thereto the Ohio Electric Power Company is charged with the performance of its covenant with the plaintiff to diligently maintain, preserve and renew all rights, powers, privileges and franchises owned by it and necessary for the business of the said company.

16. Plaintiff is informed and believes, and therefore avers, that the defendant, the City of Norwalk, threatens to, and will, unless restrained by this court, proceed summarily in disregard of the rights of this plaintiff to dismantle or cause to be dismantled, and remove or cause to be removed the poles, wires and other equipment of the Ohio Electric Power Company from the streets, alleys and public places of said city, pursuant to the said resolution of ouster passed by the council of said city in 1926, and unless restrained said defendant, the City of Norwalk, will coerce the officers and officials of the Ohio Electric Power Company, to proceed to the dismantling and removal of said poles, wires and other equipment, and will wholly prevent said company from operating its said line and equipment and from continuing to exercise its said franchise rights, to the irreparable injury of this plaintiff and said bondholders for whom the plaintiff is trustee. Neither this plaintiff nor, as plaintiff is informed and believes, any of the bondholders under said mortgage and deed of trust and supplemental mortgage thereto under which this plaintiff acts as trustee for said bondholders, were parties to or were in any way served with process or represented in said quo warranto suit instituted by the State of Ohio on the relation of Edgar G. Martin to oust the Ohio Electric Power Company from the exercise of its perpetual franchise rights in the City of Norwalk, and as to them the passage of said resolution of ouster by the city council of the City of Norwalk in 1926 and the threatened acts of the city in reliance thereon and under said state court decree constitute an impairment of the obligation of the contract of the Ohio Electric Power Company, with the State of Ohio, which contract rights are held by this plaintiff under said mortgage and

deed of trust and supplemental mortgage thereto, and a taking of the property of this plaintiff without due process of law, in violation of the Constitution of the United States, especially Article 1, Section 10, the Fifth Amendment thereto, and Section 1 of the Fourteenth Amendment thereto, and will constitute irreparable damage to this plaintiff, for which it has no adequate remedy at law.

This plaintiff is informed and believes, and therefore avers, that during all the years that the Ohio Electric Power Company and its predecessors in title have held said perpetual franchise rights, and the tangible property used in the exercise of said perpetual franchise rights there has been assessed by the officers and authorities of Ohio and Huron County, Ohio, against said rights and tangible property taxes and assessments of which a portion have been allocated to and received by said City of Norwalk with full knowledge on the part of said city that said taxes and assessments were so assessed and collected, and with complete acquiescence by said city therein and recognition by it that the same were assessed and collected under a claim of right.

By reason of the facts hereinbefore set forth, the defendant, the City of Norwalk, is estopped to assert as against the plaintiff that this plaintiff does not as trustee hold as security for the bonds aforesaid a valid and subsisting perpetual franchise, as aforesaid, of Ohio Electric Power Company, and is estopped to assert that there is now no agreement between said city and said Ohio Electric Power Company as to the mode of use of the streets, alleys and public places of the city by said company under said franchise.

Wherefore, plaintiff prays that a preliminary injunction may issue herein enjoining and restraining the defendant, City of Norwalk, and the officers, officials, agents, employes and representatives of said defendant, from in any manner interfering with or interrupting the continued operation of the plant and electrical distribution system of the Ohio Electric Power Company, in the streets, alleys or other public places of the City of Norwalk, and from taking any steps or doing any act to dismantle, wreck or remove any part of said system from the streets, alleys and public places of said city until such time as all the obligation of said Ohio Electric Power Company to plaintiff and to all bondholders holding bonds issued under said mortgage and deed of trust and supplemental mortgage thereto have been in all respects performed, and that upon final hearing herein

such injunction may be made perpetual; plaintiff further prays that said resolution or ordinance of the City of Norwalk, passed on March 23, 1926, be declared null and void, as an attempt to impair the contractual rights of the plaintiff and to deprive it of its property without due process of law, in violation of the Constitution of the United States; and plaintiff further prays that this honorable court will decree to the plaintiff all such other and further relief, general as well as special, as may be equitable and the nature of its case may require, and to which this plaintiff may be entitled under the laws and Constitution of the United States.

Tracy, Chapman & Welles,
Murray, Aldrich & Webb,
Solicitors for Plaintiff.

Thos. H. Tracy,
Geo. D. Welles,
Earl F. Boxell,
Robert P. Patterson,
Of Counsel.

State of New York, County of New York, ss:

Samuel Armstrong, first being duly sworn, deposes and says that he is a vice-president of The Equitable Trust Company of New York, a New York corporation, plaintiff in this action; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes them to be true.

Samuel Armstrong.

Sworn to before me and subscribed in my presence this 28th day of December, 1929.

Gerard L. McCabe,
Notary Public, Kings County
(Seal) Clerk's No. 214, Register's No. 1125
New York Co. No. 307, Register's No. 1Mc217
Bronx Co. No. 26, Register's No. 3155.
Commission Expires March 30, 1931

No. 25895 Series B

State of New York, County of New York, ss:

I, Thomas M. Farley, Clerk of the County of New York, and also Clerk of the Supreme Court in and for said county, do hereby certify that said court is a court of record, having by law a seal; that Gerard L. McCabe, whose name is subscribed to the annexed certificate or

proof of acknowledgment of the annexed instrument was at the time of taking the same a Notary Public acting in and for said county, duly commissioned and sworn, and qualified to act as such; that he has filed in the clerk's office of the County of New York a certified copy of his appointment and qualification as Notary Public for the County of Kings with his autograph signature; that as such Notary Public, he was duly authorized by the laws of the State of New York to protest notes; to take and certify depositions; to administer oaths and affirmations; to take affidavits and certify the acknowledgment and proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this state; and further, that I am well acquainted with the handwriting of such Notary Public and verily believe that his signature to such proof or acknowledgment is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at the City of New York, in the County of New York, this 30th day of December, 1929.

Thomas M. Farley,
Clerk.

(Seal)

AMENDMENT AND SUPPLEMENT TO BILL OF COMPLAINT

(Filed Jan. 8, 1930)

Now comes the plaintiff, The Equitable Trust Company of New York, and by way of amendment and supplement to its bill of complaint filed herein, and further complaining of defendant, for its cause of action against it says:

1. Plaintiff is informed and believes, and therefore avers, that The Ohio Electric Power Company, as set forth in the twelfth paragraph of the bill of com-

plaint filed herein, in cause number 12781, entitled Ohio Electric Power Company, Plaintiff, vs. Northern Ohio Telephone Company, the City of Norwalk et al., Defendants, in the Court of Common Pleas of Huron County, Ohio, on October 26th, 1927, secured a temporary injunction against the defendant, City of Norwalk, and certain of its officials and employees, enjoining said city, its said officials and employees, from removing, interfering with and destroying the poles and overhead construction, light and power lines of The Ohio Electric Power Company in and upon and along the streets, public places and ways in the City of Norwalk, Ohio, and especially upon and along West Main Street and North and South Linwood Avenues in said city.

2. Plaintiff is informed and believes, and therefore avers, that early in the morning of said date of October 26, 1927, on which said temporary injunction was secured, the defendant, City of Norwalk, did in fact by physical force begin to remove the poles, wires and other equipment of The Ohio Electric Power Company from West Main Street in the vicinity of its intersection with Linwood Avenue, in the City of Norwalk, and succeeded in so removing a large number of said poles, wires and much other equipment, and that said temporary injunction in the Common Pleas Court of Huron County was secured by The Ohio Electric Power Company in order to restrain the city from such wrongful removal of the company's poles, wires and other equipment.

Plaintiff is informed and believes, and therefore avers, that on January 3rd, 1930, the defendant, City of Norwalk, asserted and threatened that it would not grant or extend to The Ohio Electric Power Company any favors, privileges or quarter of any kind, and that said city would act as promptly as possible and would put The Ohio Electric Power Company out of said city as quickly as it could. Plaintiff is informed and believes, and therefore avers, that in making such assertion and threat the defendant city meant and had in mind, and does intend, to apply to the Court of Common Pleas of Huron County, Ohio, for the dissolution of said temporary injunction granted by said court in favor of The Ohio Electric Power Company against said city on October 26th, 1927, and that said Court of Common Pleas of Huron County is bound to follow the decisions of the Courts of Appeals and of the Supreme Court of the State of Ohio, and by reason of the judgment of ouster rendered by the Court of Appeals for

Huron County, Ohio, against The Ohio Electric Power Company in the quo warranto action instituted therein in the name of the State of Ohio on the relation of Edgar G. Martin, prosecuting attorney of Huron County, State of Ohio, and the affirmance of said judgment by the Supreme Court of Ohio, the Common Pleas Court of Huron County, Ohio, will upon such application dissolve said temporary injunction. Plaintiff is informed and believes, and therefore avers, that defendant, City of Norwalk, further had in mind by said assertion and threat, that it would put The Ohio Electric Power Company out of the city as quickly as possible, and intends upon the dissolution of said temporary injunction in the Common Pleas Court of Huron County, Ohio, to proceed, and unless restrained by this court, will proceed to the forcible removal of the poles, wires and other equipment of The Ohio Electric Power Company in the streets, alleys and public places of said city.

3. Plaintiff is informed and believes, and therefore avers, that the defendant, City of Norwalk, during the past year, or more, has followed a systematic policy of removing meters of The Ohio Electric Power Company from houses and buildings formerly occupied by customers of The Ohio Electric Power Company on the vacation of said houses and buildings by said customers, and the installation in place thereof of meters of the municipal electric light and power company operated by the City of Norwalk, without obtaining the consent thereto of anyone.

Wherefore, plaintiff prays that a temporary restraining order may issue herein enjoining and restraining the defendant, City of Norwalk, and the attorneys, officers, officials, agents, employees and representatives of said defendant in terms and effect as prayed for in plaintiff's bill of complaint, and further enjoining and restraining the defendant, City of Norwalk, and the attorneys, officers, officials, agents, employees and representatives of said defendant from taking any steps or action of any kind whatever to cause the enforcement or carrying out by the sheriff of Huron County, Ohio, or any of his deputies, or by any other officers of any of the courts in the State of Ohio, of the judgment of ouster entered by the Court of Appeals of Huron County, Ohio, in the quo warranto action instituted in the name of the State of Ohio on the relation of Edgar G. Martin, prosecuting attorney of Huron County, State of Ohio, against the Ohio Electric Power Company, which judgment was affirmed by the Supreme Court of Ohio, and from apply-

ing to any of the courts of the State of Ohio for any writ, process or order of any kind whatever for the purpose of enforcing and carrying out said judgment of ouster. Plaintiff further prays that a preliminary injunction may issue containing in effect such temporary restraining order, and that upon final hearing herein such injunction may be made perpetual.

Tracy, Chapman & Welles,
Murray, Aldrich & Webb,
Solicitors for Plaintiff.

Thos. H. Tracy,
Geo. D. Welles,
Earl F. Boxell,
Robert P. Patterson,
Of Counsel.

State of Ohio, Lucas County, ss.

Earl F. Boxell, first being duly sworn, deposes and says that he is one of the solicitors of the Equitable Trust Company of New York, plaintiff in the above entitled action; that he has read the foregoing amendment and supplement to bill of complaint; that the allegations thereof are made with reference to information gained by him on January 3rd, 1930, and therefore he makes this verification; that the allegations of said amendment and supplement to bill of complaint are true except as to matters stated to be upon information and belief, and as to those matters he believes them to be true.

Earl F. Boxell.

Sworn to before me and subscribed in my presence this 8th day of January, 1930.

Helen M. Johnston,
(Seal) Notary Public, Lucas County, Ohio.
My commission expires Sept. 15, 1931.

AFFIDAVIT
(Filed Jan. 8, 1930)

State of Ohio, Lucas County, ss.

Earl F. Boxell, first being duly sworn, deposes and says that he is of counsel for the plaintiff in the above entitled action by The Equitable Trust Company of New York, Plaintiff, vs. City of Norwalk, Defendant; that on January 3rd, 1930, he called upon Mr. G. Ray Craig, in Mr. Craig's office at Norwalk, Ohio; that G. Ray Craig is and has been of counsel for the plaintiff in the quo warranto action instituted in the name of the State of Ohio, on the relation of Edgar G. Martin, prosecuting attorney of Huron County, State of Ohio, against the Ohio Electric Power Company in the Court of Appeals of Huron County, Ohio, in which a judgment of ouster was entered against the Ohio Electric Power Company, which judgment was affirmed by the Supreme Court of Ohio; that upon said occasion affiant informed Mr. Craig as one of the attorneys for the defendant, City of Norwalk, that the bill of complaint in the above entitled action had been filed in the morning of January 3rd, 1930; that affiant called to the attention of Mr. Craig the fact that there was still in effect the temporary injunction which was granted in favor of the Ohio Electric Power Company by the Common Pleas Court of Huron County, Ohio, in Cause No. 12781 upon its docket, entitled Ohio Electric Power Company, Plaintiff, vs. Northern Ohio Telephone Company, the City of Norwalk et al., Defendants, by which the City of Norwalk and certain of its officials and employees were enjoined from removing, interfering with and destroying the poles and overhead construction, light and power lines of the Ohio Electric Power Company in and upon and along the streets, public places and ways in the City of Norwalk, Ohio, and especially along and upon West Main Street and North and South Linwood Avenues in said city; that affiant remarked to Mr. Craig that while the Common Pleas Court of Huron County, Ohio, would in all probability feel bound upon an application therefor by the City of Norwalk to dissolve said temporary injunction by reason of the decision of the Court of Appeals of Huron County, Ohio, in said quo warranto action and the decision of the Ohio State Supreme Court affirming said judgment of ouster, that it was affiant's belief that this court would not permit the poles, lines and electrical distribution equipment of the Ohio Electric Power Company in the City of Norwalk to be removed

and torn out by said city pending the final determination of this cause, in view of which it would be advisable and for the best interests of the parties to the within action to come to an agreement whereby no action would be taken by the City of Norwalk for the dissolution of said temporary injunction in the Common Pleas Court of Huron County, Ohio, pending the final determination of the issues in the within suit, and thereby eliminate the necessity for an application and hearing upon the same for a preliminary injunction herein, and thus make it possible to have all the issues herein determined in one hearing, namely, final hearing to be had at a date as early as possible; that thereupon Mr. Craig asserted vigorously that the City of Norwalk would not agree to anything, that said city would extend no privileges, favors, or quarter whatever to the Ohio Electric Power Company, and that said City of Norwalk would put the Ohio Electric Power Company and its poles, lines and equipment out of said city as quickly as possible.

Further affiant saith not.

Earl F. Boxell.

Sworn to before me and subscribed in my presence this 8th day of January, 1930.

Helen M. Johnston,

(Seal) Notary Public, Lucas County, Ohio.

My commission expires Sept. 15, 1931.

TEMPORARY RESTRAINING ORDER

(Filed Jan. 8, 1930)

This day this cause came on to be heard upon the application of the plaintiff, The Equitable Trust Company of New York, for a temporary restraining order, and the plaintiff offered in support of said application its verified bill of complaint, the verified amendment and supplement to its bill of complaint, and the affidavit filed with said amendment and supplement to the bill of complaint.

The court upon consideration of the averments of said bill of complaint and the amendment and supplement thereto and of said affidavit, finds that at this time a temporary restraining order should be issued herein, notice having been given to the defendant, for the reason that it clearly appears from specific facts shown by the verified bill of complaint and the amendment and supplement thereto and by said affidavit that immediate and irreparable loss or damage will likely result to plaintiff before the matter can be heard upon a motion for preliminary injunction and notice thereof, and that among such specific facts so shown are that plaintiff is trustee for numerous holders of bonds issued by the Ohio Electric Power Company under the provisions of a mortgage and deed of trust dated July 1, 1924, and a supplemental mortgage thereto dated May 25, 1925, executed and delivered by the Ohio Electric Power Company to the Seaboard National Bank of the City of New York, covering all of the properties, rights and franchises of the Ohio Electric Power Company in the City of Norwalk, Ohio; that The Equitable Trust Company of New York has succeeded to all the rights and duties of the Seaboard National Bank of the City of New York under said mortgage and deed of trust and supplemental mortgage thereto; that as shown by said bill of complaint and the amendment and supplement thereto, said defendant, City of Norwalk, has threatened to proceed summarily and in disregard of the rights of the plaintiff and the holders of said bonds, to dismantle and remove the poles, wires and other equipment of the Ohio Electric Power Company from the streets, alleys, and public places of said city, and to prevent said company from operating its lines and equipment and from exercising its perpetual franchise rights in said city, and action has been taken and attempts have been made by said city and its officials and employees to accomplish said results, and said city, its officials and employees have actually

removed part of the poles, lines and equipment of said company, all in violation of the rights of the plaintiff; and that as shown by said bill of complaint and amendment and supplement thereto and affidavit, there is imminent danger of great injury and damage to the property rights of plaintiff. And the court finds that it is necessary to direct that the defendant herein, its attorneys, officers, officials, agents, employees and representatives, be restrained from and after the day and hour of the issuance of this order, as hereinafter set forth.

It is therefore ordered, adjudged and decreed that during the continuance of this temporary restraining order the defendant herein, its attorneys, officers, officials, agents, employees and representatives, and those in active concert or participating with them and all persons whomsoever to whom notice of this order shall come, be and they are severally and collectively hereby enjoined and restrained as follows:

From in any manner inteffering with or interrupting the continued operation of the plant and electrical distribution system of the Ohio Electric Power Company in the streets, alleys or other public places of the City of Norwalk, Ohio, and from taking any steps or doing any act to dismantle, wreck, or remove any part of said system from the streets, alleys and public places of said city until such time as all the obligations of said Ohio Electric Power Company to plaintiff and to all bondholders holding the bonds issued under the mortgage and deed of trust dated July 1, 1924, and the supplemental mortgage thereto, dated May 25, 1925, both of which instruments were executed and delivered by the Ohio Electric Power Company to the Seaboard National Bank of the City of New York, to all the rights and duties of which under said mortgage and deed of trust and supplemental mortgage thereto plaintiff, The Equitable Trust Company of New York, has succeeded, have been in all respects performed.

From taking any steps or action of any kind whatever to cause the enforcement or carrying out by the sheriff of Huron County, Ohio, or any of his deputies, or by any other officers of any of the courts in the State of Ohio, of the judgment of ouster entered by the Court of Appeals of Huron County, Ohio, in the quo warranto action instituted therein in the name of the State of Ohio on the relation of Edgar G. Martin, prosecuting attorney of Huron County, State of Ohio, against the Ohio Electric Power Company, which judgment was affirmed by the Supreme Court of Ohio, and from applying to

any of the courts of the State of Ohio for any writ, process or order of any kind whatever for the purpose of enforcing and carrying out said judgment of ouster.

This temporary restraining order shall be effective as of Wednesday, January 8th, 1930, at ten o'clock A.M., and shall continue in force until further order of this court, but not beyond ten o'clock A.M. of Saturday, January 18th, 1930.

Plaintiff's application for a temporary injunction is hereby set for hearing at the court room of this court at Toledo, Ohio, at ten o'clock A.M. on January 15, 1930, and the service of this order on the defendant shall constitute notice of the said hearing to the defendant. At said time the court will consider the advisability and propriety of entering herein an order of preliminary injunction on the lines of this order, or as the same may be then or theretofore modified. The court reserves the right to modify this order at any time upon its own motion and without hearing, if the court shall deem it necessary so to do to make this order more effective to bring about the purpose for which the same is now issued, and the right is granted to the complainant to ask at any time prior to the expiration of this order that there be added hereto such provisions as plaintiff may deem necessary.

The marshal for the Northern District of Ohio is directed to make service of this order upon the defendant and to see that this order is enforced, and to arrest or cause to be arrested any person or persons caught in the act of disobeying any of the provisions of this order and bring such person or persons forthwith before the court, and to report to the court such other acts of the disobedience of this order as may come to his attention. The marshal is ordered and directed to call to his assistance such persons, either as deputy marshals, or otherwise, as he may deem necessary, and is authorized by law to do, for the purpose of securing complete obedience to the provisions hereof.

This order shall not be effective until the plaintiff shall have given bond, conditioned according to law, in the sum of Five Hundred ($500.00) Dollars.

Geo. P. Hahn, Judge.

BOND

(Filed Jan. 8, 1930)

Know All Men by These Presents, that The Equitable Trust Company of New York, as principal, and Fidelity & Deposit Company of Maryland, as surety, are held and firmly bound unto the City of Norwalk, Ohio, the defendant named in Cause No. 1040, In Equity, pending in the District Court of the United States for the Northern District of Ohio, Western Division, in the sum of Five Hundred ($500.00) Dollars, to the payment of which they bind themselves, their successors and assigns, firmly by these presents.

The condition of the above obligation is such that whereas The Equitable Trust Company of New York having filed on the chancery side of the District Court of the United States for the Northern District of Ohio, Western Division, a bill of complaint and amendment and supplement to said bill of complaint against the said City of Norwalk, Ohio, and having obtained the allowance of a temporary restraining order as prayed for in said bill of complaint and the amendment and supplement thereto from the Honorable George P. Hahn, judge of said court, now if the said The Equitable Trust Company, of New York, shall abide by the decisions of said court and pay such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained by said temporary restraining order, then these presents shall be void, otherwise to remain in full force.

Signed, sealed and delivered this 8th day of January, 1930.

The Equitable Trust Company of New York,
By Tracy, Chapman & Welles, Its Attorneys.
The Fidelity & Deposit Company of Maryland,
By Wm. B. Welles,
Surefy. (Seal)

Signed and sealed in the presence of:
Charles Weirich
A. M. Stiller

Approved:
Geo. P. Hahn, District Judge.
January 8, 1930.

ORDER CONTINUING INJUNCTION
(Filed Jan. 18, 1930)

On Wednesday, January 15th, 1930, this cause came on to be heard upon plaintiff's motion for a preliminary injunction and plaintiff offered to proceed forthwith with the hearing thereon, and the defendant having at that time filed its motion for an order to quash the writ of subpoena issued herein and to vacate and set aside the return of service thereon, which motion was taken under advisement, and defendant not being ready to proceed upon the plaintiff's motion for a preliminary injunction, the hearing on said motion was postponed, and the court finding it necessary to extend and keep in force the temporary restraining order heretofore granted herein on January 8th, 1930, for the reasons stated therein, for ten (10) days from January 18th, 1930, at ten o'clock A.M. until January 28th, 1930, at ten o'clock A.M.

It is, therefore, with defendant's consent, hereby ordered that the temporary restraining order heretofore granted herein on January 8th, 1930, be, and the same hereby is extended and continued in full force and effect for ten (10) days from January 18th, 1930, at ten o'clock A.M., until January 28th, 1930, at 10 o'clock A.M., without prejudice to such rights as the defendant may have under its motion to quash the writ of subpoena and to vacate and set aside the service thereof upon the defendant.

Geo. P. Hahn, Judge.

9:57 A.M., 18 January, 1930.

ORDER CONTINUING INJUNCTION
(Filed Jan. 28, 1930)

On Tuesday, January 28th, 1930, came the plaintiff and the defendant herein by their respective counsel and agreed by mutual consent that the temporary restraining order heretofore granted herein on January 8th, 1930, might be further extended and kept in full force and effect until such time as this cause can be submitted and decided upon final hearing, subject to such rights as the defendant may have under its motion to quash the writ of subpoena and to vacate and set aside the service thereof upon the defendant, and the court finding it necessary to further so extend and keep in force the temporary restraining order heretofore granted herein on January 8th, 1930, for the reasons stated therein, and to prevent irreparable damage to the plaintiff.

It is, therefore, by mutual agreement of the plaintiff and the defendant, hereby ordered that the temporary restraining order heretofore granted herein on January 8th, 1930, be, and the same hereby is further extended and continued in full force and effect from January 28th, 1930, at ten o'clock A.M. until this cause can be submitted and decided upon final hearing, without prejudice to such rights as the defendant may have under its motion to quash the writ of subpoena and to vacate and set aside the service thereof upon the defendant.

Geo. P. Hahn, Judge.

January 28, 1930.

Approved:

Tracy, Chapman & Welles of
Solicitors for Plaintiff.

G. Ray Craig of
Solicitors for Defendant.

MOTION

(Filed Aug. 5, 1930)

Now comes The Chase National Bank of the City of New York, and says that it is now and has been for many years a corporation duly organized and existing under and by virtue of the laws of the United States for the purpose of engaging in a general banking and trust business, in which business it has engaged since its incorporation; that it is a citizen and resident of the State of New York; that The Chase National Bank of the City of New York by merger with it on May 31, 1930, of The Equitable Trust Company of New York, the plaintiff herein, duly accomplished by appropriate action of said corporations' respective boards of directors and stockholders, has acquired and succeeded to all of the properties and rights formerly held by said The Equitable Trust Company of New York, and particularly to all those properties and rights set forth and asserted by The Equitable Trust Company of New York in the bill of complaint and the amendment and supplement to the bill of complaint filed herein, and that it is fully authorized to take and hold in trust the property formerly held by The Equitable Trust Company of New York under the mortgage and deed of trust and supplemental mortgage thereto deseribed in the bill of complaint herein, and to execute the trust imposed upon it by the provisions of said instruments, and that it now holds and is engaged in carrying out said trust.

The Chase National Bank of the City of New York, therefore, moves the court for an order reviving this action in its name as plaintiff against the City of Norwalk, Ohio, and that The Chase National Bank of the City of New York be substituted as plaintiff herein in place of The Equitable Trust Company of New York, with all of the rights and benefit of all orders and proceedings heretofore taken herein by or on behalf of The Equitable Trust Company of New York, and that this cause stand in the same condition with respect to the parties upon such substitution as it was in with respect to the original parties at the time of said merger.

Tracy, Chapman & Welles,
Murray, Aldrich & Webb,
Solicitors for Plaintiff.

Thos. H. Tracy,
Geo. D. Welles,
Earl F. Boxell,
T. N. Pfeiffer,
Of Counsel.

State of New York, County of New York, ss.

G. A. Kinney, being first duly sworn, deposes and says that he is a vice-president of The Chase National Bank of the City of New York; that he has read the foregoing motion and knows the contents thereof, and that the same is true.

G. A. Kinney.

Sworn to before me and subscribed in my presence this 8th day of July, 1930.

Walter S. Nelson,
Notary Public, New York County, N. Y.
Notary Public, Kings County,
(Seal) Clerk's No. 51, Register's No. 2059
New York Co. No. 148, Register's No. 2N109
Queens Co. No. 374, Register's No. 2376
Commission Expires March 30, 1932

ORDER

(Filed Aug. 5, 1930)

This day this cause came on for hearing upon the motion of The Chase National Bank of the City of New York for an order reviving this action in its name and substituting it as plaintiff in place of The Equitable Trust Company of New York, and it appearing to the court from the verified statements contained in said motion that said The Chase National Bank of the City of New York by merger with it of The Equitable Trust Company of New York on May 31, 1930, has acquired and succeeded to all of the properties and rights then held by The Equitable Trust Company of New York, including whatever title said The Equitable Trust Company of New York then had to the property and rights asserted by it in the bill of complaint and amendment and supplement thereto herein, and that the City of

Norwalk has consented to the revivor of this action against it and the substitution of The Chase National Bank of the City of New York as plaintiff in place of The Equitable Trust Company of New York with the consent of both parties.

It is hereby ordered that said The Chase National Bank of the City of New York be, and it is hereby substituted in place of The Equitable Trust Company of New York as party plaintiff in this action, with all the rights and benefit of all orders and proceedings heretofore taken herein by or on behalf of The Equitable Trust Company of New York, and that this action stand revived in the same condition with respect to the parties herein upon such substitution as it was in with respect to the original parties at the time of said merger, and shall proceed in the name of the said The Chase National Bank of the City of New York as plaintiff against the City of Norwalk, Ohio, as defendant.

Geo. P. Hahn, Judge.

SECOND AMENDMENT AND SUPPLEMENT TO BILL OF COMPLAINT

(Filed Aug. 5, 1930)

Now comes The Chase National Bank of the City of New York, having been substituted as plaintiff herein for and having succeeded to the rights and benefit of all orders and proceedings taken herein by and for The Equitable Trust Company of New York, pursuant to the orders of this court by way of a second amendment and supplement to the bill of complaint filed herein, and further complaining of defendant for its cause of action against it says:

1. The Chase National Bank of the City of New York is now and has been for many years a corporation duly organized and existing under and by virtue of the laws of the United States for the purpose of engaging

in a general banking and trust business, in which business it has been engaged since its incorporation, and is a citizen and resident of the State of New York.

The Chase National Bank of the City of New York by merger with it on May 31, 1930, of The Equitable Trust Company of New York, formerly a banking corporation, duly organized and existing under the laws of the State of New York, and the original plaintiff herein, duly accomplished by appropriate action of said corporations' respective boards of directors and stockholders, has acquired and succeeded to all of the properties and rights formerly held by said The Equitable Trust Company of New York, and particularly to all those properties and rights set forth and asserted by The Equitable Trust Company of New York in the bill of complaint and the amendment and supplement to bill of complaint filed by it herein.

The Chase National Bank of the City of New York is fully authorized to take and hold in trust the property formerly held by The Equitable Trust Company of New York under the mortgage and deed of trust and supplemental mortgage thereto described in the bill of complaint herein, and to execute the trust imposed upon it by the provisions of said instruments, and adopts all things done and proceedings heretofore taken herein by and on behalf of The Equitable Trust Company of New York.

2. Plaintiff hereby amends Section 5 of the bill of complaint herein so as to make said Section 5 read as follows:

> "Plaintiff is informed and believes, and therefore avers, that the Ohio Electric Power Company is a corporation organized and existing under the laws of the State of Ohio for the purpose, among others, of furnishing customers with electric power, light and energy, and owning, maintaining, and operating all equipment necessary therefor, in which business said company is and has been engaged in the City of Norwalk and elsewhere since its incorporation on August 12, 1924. Said company on August 28, 1924, in the proper exercise of its powers under the laws of the State of Ohio, and in accordance with resolutions duly passed by its board of directors and its stockholders at respective meetings thereof duly called and held, duly authorized the issue of First Mortgage Gold Bonds in one or more series, maturing at such dates and bearing interest at such rates,

respectively, as the board of directors of the company should determine, and as should be approved by the trustee; such bonds to be coupon bonds, registerable or non-registerable as to principal, as the board of directors of the company might determine, and/or registered bonds without coupons, to be executed under the corporate seal of the company, and to be signed in its corporate name by its president or vice-president, impressed with its corporate seal, and attested by its secretary or an assistant secretary, and authenticated by the certificate of the trustee, and the amount of the bonds so to be made, issued, authenticated and delivered to be not limited except that no further bonds should be issued at any time if the total amount of bonds to be outstanding after such issue would in any event exceed the then limit of indebtedness, if any, of the company permitted by law. By the terms of said bonds the Ohio Electric Power Company promised to pay in the case of coupon bonds to the bearer thereof, and in the case of registered bonds, to the registered owner thereof, or his assigns, at the office or agency of the company, the principal sum thereof at the maturity thereof, with interest as specified therein, in gold coin of the United States of America of the standard of weight and fineness, as it then existed, upon the presentation and surrender thereof. The form and tenor of said bonds are set forth specifically in the mortgage and deed of trust above referred to."

3. Plaintiff hereby amends Section 6 of the bill of complaint herein so as to make said section read as follows:

"The Ohio Electric Power Company, on or about September 2, 1924, being thereunto duly authorized by action of its board of directors, and its stockholders, pursuant to the laws of the State of Ohio in such case made and provided, duly executed and delivered to The Seaboard National Bank of the City of New York, as trustee, its certain mortgage and deed of trust, dated July 1, 1924, wherein and whereby in order to secure the payment both of the principal and interest of all such bonds as above stated which might thereafter be issued and outstanding, and in order to secure the performance and observance of all the

covenants and conditions contained in said mortgage and deed of trust, said company granted, bargained, sold, released, conveyed, assigned, transferred, pledged, set over and confirmed to The Seaboard National Bank of the City of New York, as trustee, and to its successor, or successors, in said trust, and to its and their assigns forever, all the various properties of the Ohio Electric Power Company therein described, and by supplemental mortgage, dated May 25, 1925, executed and delivered on or about May 29, 1925, by said Ohio Electric Power Company granted, bargained, sold, released, conveyed, assigned, pledged, set over and confirmed to said The Seaboard National Bank of the City of New York, as trustee, in like manner and for the same purposes as expressed in said mortgage and deed of trust, all of the properties, franchises and rights of said Ohio Electric Power Company located in the City of Norwalk, County of Huron, and State of Ohio, including especially all of said company's contracts, franchises, grants, rights and privileges which said company then had or might have in the City of Norwalk, or in connection with the conduct of an electric light, heat and power business in said city. Plaintiff as hereinabove stated by merger with it of The Seaboard National Bank of the City of New York duly acquired all the right, title and interest of said The Seaboard National Bank of the City of New York in and to the properties conveyed by said mortgage and deed of trust, and supplemental mortgage thereto, and has duly accepted the trust therein created, and plaintiff then was and is now fully authorized and empowered to take and hold in trust the property thereby conveyed and to execute the trust imposed on it under and by virtue of the provisions thereof.

Said mortgage and deed of trust and supplemental mortgage thereto were duly filed for record with the recorder of Huron County, Ohio, on 19th day of June, 1925, at 11 o'clock A.M., and were thereafter duly recorded respectively in the Huron County, Ohio, Mortgage Records at Vol. 95, pages 41/74, incl., and Vol. 95, pages 75/8, incl. And plaintiff is informed and believes and therefore avers, that it was well known to the City of Norwalk that said mortgage and supplemental mortgage in favor of plaintiff covered all the fran-

chises, rights and privileges, as well as other property of the Ohio Electric Power Company in the City of Norwalk."

4. Plaintiff hereby amends Section 13 of the bill of complaint so as to make the first paragraph of said Section 13 read as follows:

"Plaintiff is informed and believes, and therefore avers, that the city council of the defendant, the City of Norwalk, on July 30, 1890, passed an ordinance and amended the same on October 7, 1890, by which ordinance and amendment thereto said city purported to grant to The Norwalk Incandescent Light Company, a partnership, its successors and assigns, a franchise and right of way on the streets, alleys and public ways of said city for the purpose of erecting, maintaining and operating thereon an electric light and power distribution system for a period of twenty years. True copies of said ordinances of the City of Norwalk passed on July 30, 1890, and October 7, 1890, respectively, are hereto attached, marked Exhibits A and B, respectively, and are made a part hereof."

5. Plaintiff hereby amends Section 16 of the bill of complaint herein by striking therefrom the words:

"the fifth amendment thereto."

Wherefore, plaintiff prays as in its bill of complaint and the amendment and supplement thereto.

Tracy, Chapman & Welles,
Murray, Aldrich & Webb,
Solicitors for Plaintiff.

Thos. H. Tracy,
Geo. D. Welles,
Earl F. Boxell,
T. N. Pfeiffer,
Of Counsel.

State of New York, New York County, ss.

G. A. Kinney, first being duly sworn, deposes and says that he is a vice-president of The Chase National Bank of the City of New York, a corporation organized and existing under the laws of the United States, plaintiff in this action; that he has read the foregoing second amendment and supplement to bill of complaint and knows the contents thereof, and that the same is true ex-

cept as to matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

G. A. Kinney.

Sworn to before me and subscribed in my presence this 8th day of July, 1930.

Walter S. Nelson,
Notary Public, New York County, New York
(Seal) Notary Public, Kings County
Clerk's No. 51, Register's No. 2059
New York Co. No. 148, Register's No. 2N109
Queens Co. No. 374, Register's No. 2376
Commission Expires March 30, 1932

EXHIBIT A

"ORDINANCE OF THE CITY OF NORWALK, OHIO,
Passed July 30, 1890

AN ORDINANCE

To grant certain privileges as therein set forth to the Incandescent Light Company of Norwalk, Ohio.

Sec. 1. Be it ordained by the City Council of Norwalk, Ohio, that the Norwalk Incandescent Light Company of Norwalk, Ohio, its successors and assigns are hereby granted for the term of twenty years from the passage of this ordinance, the right of way through, in and upon the streets, sidewalks, alleys and public grounds of the said City for the use and purpose of therein and thereon erecting, maintaining and using all necessary poles or posts of wood, iron or other suitable material, and the necessary wires successfully to operate and use the Heisler system of Incandescent lighting in said City. Provided that the said Company its successors or assigns shall maintain and use under reasonable restrictions and rules said poles or posts and wires. That said posts or poles and wires on Main street in said City shall be at least twenty feet high and of the usual height other whereas, and be so placed as not to interfere with the travel upon such streets or other places, or so as not to interfere with any ornamental or shade trees without the consent of the owner or owners thereof or of the City Commissioners, and provide further that all those parts of such streets or other public places used in erecting said poles or wires shall be

erected and maintained in good order by the said company its successors and assigns and provided that said posts and wires shall be placed so as not to interfere with the flow of water in any drain or gutter of said city. The points for the location of such poles shall be determined under the direction of the Street Committee of said Council. This grant of way is not exclusive and the said Council reserves the power to grant similar powers to other parties whenever in its opinion it deems it advisable so to do, but such right shall not be used so as to interfere with any rights hereby granted.

Passed July 30, 1890.

Wm. Himberger, Pres. of Council.

Attest: John W. Rexford, City Clerk."

EXHIBIT B

"ORDINANCE OF THE CITY OF NORWALK, OHIO,
Passed Oct. 7, 1890

AN ORDINANCE

An Ordinance to Amend an Ordinance Entitled, An Ordinance to Grant Certain Privileges as Therein Set Forth to the Incandescent Lighting Company of Norwalk, Ohio, Passed July 30th, 1890.

Section 1. Be it ordained by the City Council of Norwalk, Ohio, that the ordinance entitled an ordinance to grant certain privileges as therein set forth to the Incandescent Light Company, of Norwalk, Ohio, passed July 30th, 1890, be and hereby is amended as follows:

Section 1. That the Norwalk Incandescent Light Company, of Norwalk, Ohio, its successors and assigns are hereby granted, for the term of twenty years from the passage of this ordinance, the right of way through, in and upon the streets, sidewalks, alleys and public grounds of said city for the use and purpose of therein and thereon erecting, maintaining and using all necessary poles or posts of wood, iron or other suitable matetrial, and the necessary wires successfully to operate and use a system of incandescent lighting in said City—Provided that the said company its successors or assigns shall maintain and use under reasonable restrictions and rules said poles or posts and wires. That said posts or poles and wires on Main street in said city shall be at least twenty feet high, and of the usual height otherwise

and be so placed as not to interfere with the travel upon such streets or other places nor with any ornamental or shade trees without the consent of the owners thereof or of the city Commissioner and provided further that all those parts of such streets or other public places in erecting said poles or wires, shall be kept and maintained in good order by said Company its successors and assigns, and provided further that said posts and wires shall be so placed as not to interfere with the flow of water in any drain or gutter of said city. The points for the location of such poles or posts shall be determined under the direction of the Street Commissioner of said Council. This grant of way is not exclusive and the said Council reserves the power to grant similar powers to other parties whenever in its opinion it deems it advisable so to do, but such right shall not be used so as to interfere with any rights hereby granted.

Section 2. That said original ordinance be and same is hereby repealed.

Section 3. This ordinance shall take effect and be in force from and after its passage and due publication.

Passed Oct. 7th, 1890.

Jno. A. Rynn, Pres. Pro Tem Council.
Attest: John W. Rexford, City Clerk."

ANSWER
(Filed Sept. 15, 1930)

The defendant, for its answer to the Bill of Complaint, Amendment and Supplement to the Bill of Complaint, and Second Amendment and Supplement to the Bill of Complaint, herein says:

1. It admits that The Chase National Bank of the City of New York is a corporation organized and existing under and by virtue of the laws of the United States for the purpose of engaging in a general banking and

trust business and is a citizen and resident of the State of New York. It further admits that The Equitable Trust Company of New York was, at the time of the filing of the Bill of Complaint herein, a corporation organized and existing under the laws of the State of New York for the purpose of engaging in a general banking and trust business.

Being without information on the subject, defendant denies that The Chase National Bank of the City of New York, by merger with it, on May 31, 1930, of The Equitable Trust Company of New York, the original plaintiff herein, has acquired and succeeded to all of the rights and properties so held by The Equitable Trust Company of New York and particularly to all those properties and rights set forth and asserted by The Equitable Trust Company of New York in the Bill of Complaint and the Amendment and Supplement thereto filed by it herein.

2. Defendant admits that it is, and was, at all times mentioned in the Bill of Complaint, and in this Answer, a municipal corporation in the State of Ohio, and that it is the county-seat of Huron County, and that it is a citizen and resident of the Western Division of the Northern District of the State of Ohio. Defendant further says that it became a municipal corporation in the State of Ohio on or before April 9, 1859 and became a city on or before April 4, 1881.

3. The defendant admits that this is a suit between citizens of different states. Defendant denies that the amount involved, exclusive of interest and costs, exceeds the sum and value of $5,000. Defendant further denies that this suit involves a controversy arising under the Constitution and laws of the United States.

4. Being without information upon the subject, the defendant denies all of the allegations of Section 4 of the Bill of Complaint.

5. Defendant admits that The Ohio Electric Power Company is an Ohio corporation organized to furnish consumers with electric power, light and energy and owning and maintaining and operating all equipment necessary therefor, but denies said company has been engaged in such business of furnishing consumers with electric power, light and energy in the City of Norwalk and elsewhere since its incorporation in 1924 and says that said company did not enter into such business in the City of Norwalk until on or about May 22, 1925.

Being without information on the subject, defendant denies all of the other allegations of Section 5 of the

Bill of Complaint, as amended by the said Amendment and Supplement to the Bill of Complaint.

6. Being without information upon the subject, defendant denies all of the allegations of Section 6 of the Bill of Complaint as amended by Section 3 of the Second Amendment and Supplement to the Bill of Complaint, except that two instruments, one purporting to be a mortgage and deed of trust, and another purporting to be a supplemental mortgage, of The Ohio Electric Power Company to The Seaboard National Bank of the City of New York, were filed for record with the Recorder of Huron County, Ohio, on or about the 19th day of June, 1925, and were thereafter duly recorded, respectively, in the Huron County, Ohio, Mortgage Records, Volume 95, pages 41 to 74, inclusive, and Volume 95, pages 75 to 78, inclusive. Defendant denies that it was known to the City of Norwalk that said mortgage and supplemental mortgage were in existence prior to the filing of the Bill of Complaint herein and further says that The Ohio Electric Power Company had no franchise, rights or privileges in the City of Norwalk before or after the execution of such mortgages and that, therefore, no such franchise, rights or privileges could be conveyed to The Seaboard National Bank in the City of New York.

7. Being without information upon the subject, defendant denies all of the allegations of Section 7 of the Bill of Complaint.

8. Defendant denies that The Ohio Electric Power Company was occupying the streets, alleys, and public places with its poles, lines, conduits and other electrical equipment, or was engaged in the business of furnishing electric current for light, heat, and power for domestic and commercial purposes, prior to the alleged execution and delivery of the mortgage and deed of trust referred to in the Bill of Complaint, but admits that, prior to the alleged execution of the supplemental mortgage, said company was occupying such streets, alleys, and public places with such equipment and engaged in the business of furnishing electric current for light, heat, and power for domestic and commercial purposes. Defendant denies that such occupancy was by virtue of any right or claim of right under any perpetual franchise or was agreed to and concurred in by the defendant and denies that said company now has, or ever had, any authority to maintain such poles, lines, conduits, and equipment and to operate the same.

9. Defendant denies that The Ohio Electric Power Company holds any franchise or right of any nature, per-

petual or otherwise, to occupy any of the alleys, streets, and public places of the City of Norwalk with its poles, lines, conduits or other equipment for the distribution of electricity. Defendant admits that a corporation known as The Incandescent Light and Power Company was incorporated under the laws of the State of Ohio on March 11, 1891, and says that its Articles of Incorporation state:

> "The purpose for which said corporation is formed is for furnishing to the citizens of Norwalk and vicinity, electric lighting of both arc and incandescent, electric and steam power, and steam and electricity, for heating, for profit."

Defendant further admits that a corporation known as The Northern Electric Company was incorporated under the laws of the State of Ohio on May 17, 1895, and says that the Articles of Incorporation of such company state:

> "Said corporation is formed for the purpose of manufacturing and producing electricity for light, heat, and power."

Defendant denies that either of said companies, by virtue of their respective incorporations, acquired from the State of Ohio, or otherwise, any franchise or right to occupy and use any street, alley, or public place in the City of Norwalk. Defendant further denies that The Ohio Electric Power Company is the successor to any rights held by The Incandescent Light and Power Company or The Northern Electric Company by assignment or otherwise.

Plaintiff admits that The Incandescent Light and Power Company, after its incorporation, acquired all the property and rights of The Norwalk Incandescent Light Company which operated an electric light and power plant and distributing system in Norwalk, Ohio, from October 7, 1890, until sometime subsequent to the incorporation of The Incandescent Light and Power Company, and says that upon acquiring such property and rights, The Incandescent Light and Power Company assumed all of the liabilities and obligations, contractual and otherwise, of The Norwalk Incandescent Light Company, and defendant further admits that all of said property and rights were transferred to The Northern Electric Company, and says that, at the same time, The Northern Electric Company assumed all of the contractual obligations of The Incandescent Light and Power Company

under any contract or grant assigned to The Northern Electric Company by the assignees of The Incandescent Light and Power Company.

Defendant admits that The Northern Electric Company did, in the year 1895, construct a plant in the City of Norwalk for the generation of electricity, but denies that such plant was either large or expensive, and further denies that such plant was constructed in reliance upon any rights acquired by said The Northern Electric Company from the assignees of The Incandescent Light and Power Company. Defendant admits that The Northern Electric Company did maintain and use the poles, wires, conduits and other equipment which had previously been erected in the streets, alleys, and public places of the City of Norwalk, and that such company did make some minor extensions of such equipment, and further admits that said company did operate a plant for the generation and distribution of electric current in said city furnishing current to the city itself and to some inhabitants thereof, but denies that any of such operations, including the building of said generating plant, were made in reliance upon any alleged grant from the State of Ohio or any perpetual rights received therefrom or upon any approval, consent or agreement of said municipality other than a certain contract, dated July 16, 1895, between the City of Norwalk and The Northern Electric Company. Said contract, which by its terms was expressly limited to a period of ten years from September 1, 1895, provided for furnishing said municipality with street lighting and lighting for its public offices and for the erection and maintenance of the plant for the generation of electricity heretofore referred to.

10. Defendant denies all of the allegations of Section 10 of the Bill of Complaint. Defendant says that The Norwalk Incandescent Light Company, a partnership, erected in October, 1890, a system of poles, wires and other electrical distribution equipment in the streets, alleys, and public places of the City of Norwalk, and that such electrical distribution system has been continuously operated and maintained in substantially the same locations, and to substantially the same extent to this day, and is now maintained and operated by The Ohio Electric Power Company. Defendant denies that The Ohio Electric Power Company now has, or ever had, any franchise or other right whatsoever to occupy the streets, alleys, and public places of the City of Norwalk with equipment for the distribution of electricity; and defendant further denies that any of the present holders of any

bonds of The Ohio Electric Power Company, secured by any such alleged mortgage, deed of trust, and supplemental mortgage, ever relied upon any alleged franchise right or other right of The Ohio Electric Power Company to occupy the streets, alleys, and public places of the City of Norwalk with its equipment for the distribution of electricity.

11. Defendant admits the passage of a resolution on March 23, 1926, as alleged in Section 11 of the Bill of Complaint, but denies that the passage of such resolution was in violation of any rights of The Ohio Electric Power Company or of the plaintiff or of the bondholders, as alleged in such section.

12. Defendant admits the allegations of Section 12 of the Bill of Complaint.

13. Defendant admits the allegations of paragraph 1 of Section 13 of the Bill of Complaint as amended by the Second Amendment and Supplement to the Bill of Complaint, and admits that Exhibits "A" and "B" attached to such Second Amendment and Supplement to the Bill of Complaint are true copies of ordinances passed by the City of Norwalk, and further says that such ordinances were accepted by the partnership, The Norwalk Incandescent Light Company. Defendant further says that the provisions of such ordinances limiting the rights granted thereunder to a term of twenty years from the date thereof were valid provisions and were binding upon The Norwalk Incandescent Light Company, its successors and assigns, and all other persons, firms, or corporations claiming or exercising any rights under such ordinances. Defendant further says that all rights to occupy streets of the City of Norwalk under said ordinances expired on October 6, 1910, and that the plaintiff and its alleged mortgagor, The Ohio Electric Power Company, have no rights to occupy the streets, alleys, and public places of the City of Norwalk with electrical equipment or otherwise by virtue of such ordinances.

Defendant denies all the allegations contained in paragraph 2 of Section 13 of the Bill of Complaint.

14. Defendant denies all of the allegations of Section 14 of the Bill of Complaint, except that it admits that the City of Norwalk has never applied to the Probate Court for direction as to mode of use of its streets, alleys, and public places by The Ohio Electric Power Company or any of the predecessors of such company.

15. Defendant denies that the electrical generating and distributing plant, poles, lines, conduits, and other

equipment of The Ohio Electric Power Company in the City of Norwalk are modern and efficient or that said system as a going and operating concern has the value of $140,000. Defendant says that such property now has only a non-productive or junk value and that the fact that some individuals, partnerships, and corporations in the City of Norwalk use electric current furnished by The Ohio Electric Power Company for light, heat, and power contributes nothing to the value of the equipment maintained by The Ohio Electric Power Company in such city and defendant further says that such electrical distribution system, either as a going concern or otherwise, is not a large and substantial portion of the security held by the plaintiff as trustee under the alleged mortgage and deed of trust and supplemental mortgage thereto to The Seaboard National Bank in the City of New York, and that the plaintiff and the owners and holders of any bonds issued by The Ohio Electric Power Company will not be deprived of any substantial portion of their secuirty if The Ohio Electric Power Company is compelled to dismantle and remove from the streets, alleys, and public places of the City of Norwalk its poles, wires, conduits, and other equipment for the distribution of electric current.

Being without information upon the subject, the defendant denies that under the alleged mortgage and deed of trust, and supplemental mortgage thereto, The Ohio Electric Power Company is charged with the performance of any covenant with the plaintiff diligently to maintain, preserve, and renew all rights, powers, privileges, and franchises owned by it and necessary for the business of said company.

16. Defendant denies all of the allegations in paragraph 1 of Section 16 of the Bill of Complaint, except that defendant admits that neither the plaintiff nor any of the bondholders under the alleged mortgage and deed of trust, and supplemental mortgage thereto were parties to, or were served with process or represented in, the quo warranto suit instituted by the State of Ohio to oust The Ohio Electric Power Company from its illegal occupancy of the streets, alleys, and public places of the City of Norwalk. Defendant denies that it has ever threatened to take any summary action to dismantle or remove the property of The Ohio Electric Power Company from the streets, alleys, and public places of the City of Norwalk. Defendant says that after the failure of The Ohio Electric Power Company to comply with the resolution of the City Council of the City of Norwalk

passed March 23, 1926, referred to in Section 11 of the Bill of Complaint and Section 11 of this Answer, the defendant filed a complaint with the Prosecuting Attorney of Huron County, Ohio, against the illegal occupation of its streets, alleys, and public places by such company. It further says that neither the passage of such resolution nor the filing of such complaint nor any other acts or alleged threatened acts of the defendant constituted any impairment of the obligation of any contract between the State of Ohio and The Ohio Electric Power Company, or constituted the taking of property of the plaintiff without due process of law, or constituted irreparable damage to the plaintiff.

Being without information upon the subject, defendant denies that The Ohio Electric Power Company and its predecessors in title have ever been assessed by the officers and authorities of Ohio, and/or Huron County, Ohio, on account of any alleged perpetual franchise rights and further says that the defendant has never had knowledge of any such assessment and has never been in a position to object to such assessment if any in fact took place. The city has never acquiesced in such assessment or knowingly received any moneys or other property from Huron County or from the State of Ohio, which arose directly or indirectly from any tax or assessment levied upon the alleged perpetual franchise rights of The Ohio Electric Power Company. Defendant denies that it is estopped to assert against the plaintiff that the plaintiff does not, as trustee, hold as security for the bonds of The Ohio Electric Power Company a valid and subsisting perpetual franchise, or that there is now no agreement between the defendant and The Ohio Electric Power Company as to the mode of use of the streets, alleys, and public places of the defendant.

17. Defendant denies the allegations appearing on page 12 (a) of the Bill of Complaint to the effect that the defendant by physical force commenced to remove the wires, poles, and other equipment of The Ohio Electric Power Company from the streets, alleys, or public places of the City of Norwalk in a manner dangerous to the public safety, or otherwise.

18. Defendant admits the allegations of Section 1 of the Amendment and Supplement to the Bill of Complaint.

19. Defendant denies all of the allegations of Section 2 of the Amendment and Supplement to the Bill of Complaint.

20. Defendant denies all of the allegations of Section 3 of the Amendment and Supplement to the Bill of Complaint.

21. Defendant further says by way of answer to the Bill of Complaint that, if any predecessor or predecessors of the plaintiff ever had any rights to occupy or use the streets, alleys, or public places of the City of Norwalk for the erection and maintenance of equipment for the distribution of electricity, such rights or franchises were waived and terminated by a certain contract, dated April 13, 1905, between the defendant and The Cleveland and Southwestern Traction Company, an Ohio corporation, through which the plaintiff claims the rights which it alleges it received from its alleged predecessors, The Incandescent Light and Power Company and The Northern Electric Company. Said contract provides for the lighting of the streets and public buildings of the City of Norwalk, and further provides that said The Cleveland and Southwestern Traction Company, its successors and assigns, would remove all poles, posts, lamps, wires and other apparatus or material of every description from the streets, alleys, and public places of the City of Norwalk, upon the termination of such contract, on or about August 31, 1915.

22. Defendant further says that the Bill of Complaint, the Amendment and Supplement thereto, and the Second Amendment and Supplement thereto, do not state a cause of action for the reason that it is apparent upon the face hereof that the State of Ohio is a necessary party to this action.

23. Defendant further says that the Bill of Complaint, Amendment and Supplement thereto, and the Second Amendment and Supplement thereto, do not state a cause of action in equity.

Wherefore, defendant prays that the Bill of Complaint be dismissed and that it have judgment for its costs herein expended and that it may be granted such other and further relief as to the court may seem meet and proper in the premises.

G. Ray Craig,
W. A. Eversman,
Counsel for the City of Norwalk.
September 15, 1930.

Receipt of copy of the foregoing is hereby acknowledged.

Tracy, Chapman & Welles,
Solicitors for Plaintiff.

THIRD AMENDMENT AND SUPPLEMENT TO BILL OF COMPLAINT

(Filed Nov. 12, 1930)

Now comes The Chase National Bank of the City of New York, having been substituted as plaintiff herein, and by leave of court first obtained files this its third amendment and supplement to the bill of complaint herein, and further complaining of defendant, for its cause of action against defendant, says that it is informed and believes and, therefore, avers that:

The city council of the defendant, City of Norwalk, on July 1, 1924, passed an ordinance in terms requiring all electric light and power wires, telephone, signal and trolley wires in operation in the City of Norwalk to be constructed and maintained in accordance with specifications thereinafter set forth in great detail. Said ordinance was intended and did amount to a consent to such companies, including the predecessors of the Ohio Electric Power Company and said last named company, to use the streets and public ways of said city in the manner and upon the terms and conditions therein set forth.

The defendant city thereafter repeatedly, during the period between July 1, 1924, and the date of the beginning of this suit, notified and directed the Ohio Electric Power Company to comply with certain provisions thereof which required that upon discontinuance of any service the wires and poles used as service lines be removed from the streets and alleys; said Ohio Electric Power Company duly complied with said notices and with all of the terms of said ordinance and accepted the same as applying to it, and the defendant city by said ordinance and notices and directions thereby recognized that the predecessors of the Ohio Electric Power Company and said company respectively were rightfully maintaining and operating said electrical distribution system in the streets and public places of Norwalk. No further, other or different ordinance has since been passed by the council of said city changing or repealing the provisions of said ordinance of July 1, 1924, with respect to the mode of use of the streets and public ways of said city by electric light and power companies.

That by reason of the facts in plaintiff's bill of complaint and herein set forth, there is now, and at all times has been, in full force and effect a consent by said city to the use of its streets and public ways, and an agreement as to the mode of such use, by the Ohio Electric Power Company and its several predecessors.

The defendant, the City of Norwalk, by reason of the facts aforesaid, as well as those set forth in plaintiff's bill of complaint as heretofore amended and supplemented, is now estopped to assert that there is now no existing agreement between it and the Ohio Electric Power Company as to the mode of use by said company of the streets and public ways of said city, and is estopped to assert that no such agreement ever existed, and is estopped to assert that the Ohio Electric Power Company does not now possess a perpetual franchise in the streets and public places of the City of Norwalk with the existing right to use said streets either in the mode of use prescribed by said ordinance of October 7, 1890, or by said ordinance of July 1, 1924.

Wherefore plaintiff prays for relief as in its bill of complaint heretofore filed herein.

Tracy, Chapman & Welles,
Murray, Aldrich & Webb,
Solicitors for Plaintiff.

Geo. D. Welles,
Earl F. Boxell,
Of Counsel.

ANSWER TO THIRD AMENDMENT AND SUPPLEMENT TO BILL OF COMPLAINT

(Filed Nov. 12, 1930)

The defendant, for its answer to the third amendment and supplement to the bill of complaint, says:

1. It admits that the city council of the defendant on July 1, 1924, passed an ordinance entitled: "An Ordinance to regulate the construction and maintenance of electric light and power wires, telephone, signal, and trolley wires." It denies that said ordinance was intended and did amount to a consent to any company, including the predecessor of the Ohio Electric Power

Company or said Ohio Electric Power Company, to use the streets and public ways of the City of Norwalk in the manner and upon the terms and conditions in said ordinance set forth.

2. Defendant says that since the passage of said ordinance defendant has issued notices and orders to various companies, including the Ohio Electric Power Company, to comply with certain provisions of said ordinance. Defendant denies that it thereafter repeatedly, during the period between July 1, 1924, and the date of the beginning of this suit, notified and directed the Ohio Electric Power Company to comply with certain provisions thereof which required that upon discontinuance of any service the wires and poles used as service lines be removed from the streets and alleys; that said Ohio Electric Power Company duly complied with said notices and with all of the terms of said ordinance, and accepted the same as applying to it, and that the defendant city, by said ordinance and notices and directions, thereby recognized that the predecessor of the Ohio Electric Power Company and the Ohio Electric Power Company respectively were rightfully maintaining and operating said electrical distribution system in the streets and public places of Norwalk. Defendant admits that no further, other, or different ordinance has since been passed by the council of the City of Norwalk, changing or repealing the provisions of said ordinance of July 1, 1924.

3. Defendant denies that by reason of the facts in plaintiff's bill of complaint and its third amendment and supplement to bill of complaint there is now and at all times has been in full force and effect a consent by said City of Norwalk to the use of its streets and public ways and an agreement as to the mode of such use by the Ohio Electric Power Company and its several predecessors.

4. Defendant denies that it is now estopped to assert that there is now no existing agreement between it and the Ohio Electric Power Company as to the mode of use by said company of the streets and public ways of said city, and denies that it is estopped to assert that no such agreement ever existed, and denies that it is estopped to assert that the Ohio Electric Power Company does not now possess a perpetual franchise in the streets and public places of the City of Norwalk with the existing rights to use said streets either in the mode of use prescribed by the ordinance of October 7, 1890, or by said ordinance of July 1, 1924.

Wherefore, defendant prays that the bill of complaint and the several amendments and supplements thereto be dismissed and that it have judgment for its costs herein expended.

G. Ray Craig,
W. A. Eversman,
E. G. Martin,
Rex F. Bracy,
Solicitors for Defendant.

November 12, 1930.

We hereby certify that a copy of the foregoing was served upon Messrs. Tracy, Chapman & Welles, solicitors for plaintiff, this 12th day of November, 1930.

Geo. D. Welles.

NARRATIVE STATEMENT OF TESTIMONY UNDER NEW EQUITY RULE 75 AND IN COMPLIANCE WITH RULE 15 OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed Nov. 21, 1931)

Appearances: For the Plaintiff: George D. Welles, Esq., and Earl F. Boxell, Esq., of Tracy, Chapman & Welles, Toledo, Ohio.

For the Defendant: G. Ray Craig, Esq., E. G. Martin, Esq., and R. F. Bracy, Esq., of Norwalk, Ohio; Walter A. Eversman, Esq., and Hugh C. Laughlin, Esq., of Williams, Eversman & Morgan, Toledo, Ohio.

This cause came on for hearing in the United States District Court for the Northern District of Ohio, Western Division, on November 12, 1930, before the Honorable George P. Hahn, District Judge, and the following proceedings then took place:

Opening statements were made to the court by counsel for the respective parties.

The plaintiff then offered in evidence, separately, Plaintiff's Exhibits 1 to 47, both inclusive.

Plaintiff's Exhibit 1 was admitted over the objection of the defendant to all statements therein relative to the payment of taxes by the Ohio Electric Power Company and its predecessors, and the defendant was allowed an exception. Plaintiff's Exhibits 2 to 47 were admitted without objection by the defendant.

DEPOSITION OF CHARLES SUHR

It was stipulated by counsel that although Charles Suhr was available, his deposition, which had been previously taken at Norwalk, Ohio, on the ground that he was aged and infirm, might be offered in whole or in part, by either party, subject to objection as to materiality or relevancy. All of the deposition of Charles Suhr, with the exception of those parts which are hereinafter quoted verbatim and which show objections by plaintiff, was offered by the plaintiff. Those parts of the deposition quoted verbatim and objected to by plaintiff were offered by the defendant and received subject to the objections of the plaintiff stated therein and its exception.

CHARLES SUHR,

being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Craig:

I am past 69 years of age and live at, and always have been a resident of, Norwalk, Ohio, where I am engaged in the practice of law. For six years I was probate judge of Huron County, Ohio, and was city solicitor

of the City of Norwalk for nearly seven years, my time as solicitor expiring January 1, 1930. In 1890, I was connected with the Norwalk Incandescent Light Company, a partnership. The other members of the partnership were Thomas Dunmore, Dr. D. W. Vail, E. D. Sawyer, myself and I think Eugene Smith and Judge D. H. Fox were also members.

Dunmore resided in Norwalk and was a plumber and steamfitter; Sawyer, a former sheriff of Cuyahoga County, resided in Cleveland; Eugene Smith, a sheriff of Huron County, resided in Norwalk; D. H. Fox had been probate judge of Huron County and was president of The Huron County Banking Company at the time of the organization of the partnership; and Dr. Vail was postmaster.

Dunmore, Vail, Sawyer, Smith, and Fox are all dead. Dr. Vail died within the past three years and the other partners twenty or twenty-five years ago.

When the partnership was organized in the middle of 1890, I was engaged in the practice of the law. In 1890, the members of the partnership met together and agreed upon what we would do. The object of the formation of the partnership was to furnish electric current for light and power.

The only partnership records kept were books of account. No record of any partnership proceedings was kept. The books of account showed the financial transactions of the company and that is all. I kept those books in my office. The partnership first leased a piece of land for a period of five years, on which it constructed a frame and brick building and in it were installed two generators and the necessary boilers and equipment for running the machinery. This plant was erected on East Seminary Street, the first street south of Main Street running parallel with it in an easterly and westerly direction. The generating plant was on the south side of the street. The steam generated from two or three boilers operated an engine, which propelled the dynamo for electric current. The dynamos were of the Thompson Huston system, and there were two generators, one producing alternating current for residential incandescent lighting and the other direct current for arc lights used for street lighting. Poles and wires were erected and a large number of transformers installed to furnish current for business and residences wherever we could go. The poles and lines were established on East and West Main Streets, Benedict Avenue, Whittlesey Avenue, and on other streets arc lights were installed, just where I

can not tell. The lines were strung on poles located on one or the other side of the street and all inside the public streets. In some instances, cross-arms were used on the poles and glass insulators. The transformers used to step down the energy for either commercial or residential purposes were erected on the poles.

Main Street in Norwalk at that time was approximately three miles in length and the lines extended about two miles through Main Street and through the business section. The business section through Norwalk on Main Street extends about one-half mile. There is little difference between the length of the business section of Main Street in 1890 and its present length. The lines for the transmission of the alternating current and the lines for the transmission of the direct current, all starting from the generating plant on Seminary Street, were put on the same pole line.

Upon the formation of the partnership, about the middle of 1890, it commenced to install machinery in its plant and to erect transmission lines.

"Q. I will ask you what the fact is as to whether or not you have any personal knowledge as to any application of the partnership being made to the City of Norwalk, the city council, for a franchise on the streets for the erection of the poles and stringing of the wires?"

Objection by the plaintiff upon the ground that the question is put in such a manner as to assume that, in compliance with the ordinance of October, 1890, it would grant a franchise.

"A. I do.

Q. Did you personally have anything to do with that?"

Objection upon the grounds stated in connection with the previous question.

"A. I was there at the council, Mr. Dunmore was there, and I think someone else. I don't know but what they all were there.

Q. Judge, I call your attention to Exhibit A attached to second amendment and supplement to bill of complaint, and will ask you to read it. A. Yes, sir.

Q. Do you recognize Exhibit A attached to second amendment and supplement to bill of complaint as being the ordinance that was passed by the City of Norwalk to the Incandescent Light Company of Norwalk, Ohio, on July 30, 1890? A. Yes, sir, I do.

Q. Is that the ordinance that was passed by the council of the City of Norwalk at a meeting where you and Mr. Dunmore were present? A. Yes, sir.

Q. Do you remember what, if anything, was said either by yourself or Mr. Dunmore, in the presence of the council immediately after the passing of that ordinance? A. My recollection is Mr. Dunmore getting up and thanking the council for granting the franchise, and made some further remarks, I don't remember what they were."

On October 7, 1890, I was before the council of the City of Norwalk, when the ordinance of October 7, 1890 (Exhibit B attached to second amendment and supplement to bill of complaint) was passed. The second ordinance dated October 7, 1890, was passed because when the first ordinance dated July, 1890 (Exhibit A attached to second amendment and supplement to bill of complaint) was passed, it provided for what was known as the Heisler System. The partnership changed their notion as to the installation of the Heisler System and, in order to install any other system they had to have the ordinance or franchise changed and for that reason they had the council pass this ordinance in October.

After the passage of the ordinance of July, 1890, Norwalk Incandescent Light Company, the partnership, then erected the poles, strung the wires and installed the necessary generating machinery. The partnership commenced business after the passage of the second ordinance and furnished some current shortly thereafter. After the passage of the ordinance in October, 1890, it carried on its business of furnishing street lighting and domestic lighting, to full capacity. The partnership made a contract with the City of Norwalk to furnish lighting for street purposes, but I do not remember its contents.

Norwalk Incandescent Light Company, the partnership, furnished lighting on the streets of Norwalk over its lines carrying direct current and at the same time furnished electricity for commercial purposes over its lines for alternating current, and that business continued until some time in the spring of 1891, when there wasn't any change except the partnership was incorporated in the name of Incandescent Light & Power Company, under the laws of Ohio.

Norwalk Incandescent Light Company had a written contract for street lighting after it commenced to do business and before the organization of the corporation.

Exhibit 3 is a copy of the articles of incorporation issued by the Secretary of State of Ohio to Incandescent Light & Power Company, of Norwalk, Ohio. I was acquainted with the incorporators. The name Dunmore

is spelled in the articles of incorporation "Dinsmore." Judge Fox was president; I was secretary and treasurer, and Tom Dunmore was general manager.

A set of corporation books was opened by Incandescent Light & Power Company consisting of the record of incorporation and of the meetings held by the corporation. Both directors' and stockholders' meetings were recorded therein and I had charge of the books. There was a corporation minute book and a stock book also, and a set of account books, journal, ledger and cash book and I was custodian of them during the time Incandescent Light & Power Company did business. These books were kept in my office in the Stewart Block, where I maintained my law office.

Incandescent Light & Power Company followed Norwalk Incandescent Light Company and was engaged in the business of furnishing electric current, power and light for three or four years.

There was no difference in the business carried on before and after previous incorporation. When the business was turned over by the partnership to the corporation, there was a formal transfer of all property. It was a written bill of sale and included all the things, everything we had.

"Q. Name the things it included as well as you can recall them at this late date.

To which question plaintiff objected unless the bill of sale is shown.

"A. It included the contract for lighting the streets, the franchise that was granted to us in October of 1890.

"Q. That is the franchise from the City of Norwalk?

To which question plaintiff objected on the ground it assumes the ordinance of 1890 was a franchise.

"A. Yes.

"Q. Do you refer to Exhibit B attached to second amendment and supplement to bill of complaint? A. Yes.

"Q. The franchise of October, 1890?

To which question plaintiff objected on the ground it assumes the ordinance of October, 1890, was a franchise.

"Q. Do you recall anything else? A. All the machinery, poles and equipment, transformers, everything the partnership had in any shape or form pertaining to the business."

Exception by the plaintiff to the introduction of the foregoing quoted testimony.

The transfer was executed by the partnership and transferred the property to the corporation, The Incandescent Light & Power Company, and as secretary of the corporation, a record of the transfer was made by me in the corporation records. All the property, which I have described, consisting of the generating plant on Seminary Street and the distribution system carrying the two lines of alternating and direct current, was turned over to the corporation and thereafter The Incandescent Light & Power Company operated it.

There was seemingly no change in the mode or method of operation, from what it had been prior to the time of the transfer. No different equipment was used by the corporation than had been used by the partnership, and no change in the business methods with reference to the public. I continued to keep the books and Dunmore continued to run the business.

After the partnership commenced to do business, the lines were extended and continued to extend during the life of the partnership, and thereafter the corporation continued to extend the lines and did so until the assignment. During the time the corporation was in operation, I was the sole custodian of the documents of the corporation. After the corporation had been in existence three or four years, it made an assignment in the Probate Court of Huron County, Ohio, to F. H. Jones and J. W. Foster. I continued to keep the corporation books, but the account books were turned over to the assignees. Exhibit 4 is the deed of assignment from The Incandescent Light & Power Company to Jones and Foster. It was executed by D. W. Vail and myself, as secretary, and filed in the Probate Court. I was the custodian of the books of the corporation, except the account books, until a case was commenced in the Common Pleas Court of Huron County March 8, 1893, by one George Cutter against The Incandescent Light & Power Company. Exhibit F is the petition filed in that case, which was referred to Mr. Kennan, as master commissioner. I was called as a witness in the Cutter case and all the books of the corporation were turned over to him as master commissioner and I do not remember of having seen them since. I attended hearings held before the master commissioner in the Gardiner Block and in the old court house, but after the books, records, papers and documents of the corporation were turned over to Kennan, as master commissioner, they were never again in my custody. I do not know where they now are, but I guess scattered to the four winds of heaven. They

were all deposited upstairs in the attic of the old court house.

As papers accumulated in the office of the clerk of the Court of Common Pleas and the clerk of the Circuit Court, they were placed in the attic of the old court house and I remember once I saw the old stock book of The Incandescent Light & Power Company in the attic of the old court house, before it burned. I do not remember when it burned, but the present court house was built about 1913 or 1914. The old court house was destroyed by fire I think in 1911 or 1912, not long after I left the probate office. I saw the fire. It originated in the attic in a room adjoining the one where the records were kept. All the contents of the room, where the surplus files were placed, were destroyed. The fire burned the entire second and third stories and not a thing was salvaged.

The written instrument that was executed by the partnership to the corporation that covered the franchise, Exhibit No. 2, and the other items of property that belonged to the partnership, to which I have referred, was with the records of the corporation. I couldn't say what became of it. It is not in my custody. I have looked for it. Everything pertaining to this corporation that I had at the time of the hearing of this case, was turned over to the master commissioner.

The written instrument or paper covering the franchise and other items of property transferred by the partnership to the corporation was turned over to the commissioner, C. L. Kennan, who was a practicing lawyer in Norwalk and who has been dead ten years. The minute book or record book of the proceedings of the stockholders and directors to the corporation and the stock book were all turned over to the master commissioner. I had nothing to do with the business affairs of Incandescent Light & Power Company after the assignment in the Probate Court and the delivery of those records, books and papers to the master commissioner.

There is very little difference between the location of the lines of Incandescent Light & Power Company and the lines of Ohio Electric Power Company as they exist today. There have been some extensions. They have kept up their lines, replacing poles when they were destroyed by the elements, and, also, wires. The lines originally laid out and extended by The Incandescent Light & Power Company cover substantially the same streets and the same portions of streets in the City of Norwalk as the lines now used by Ohio Electric Power Company.

After I turned over the books, records, papers and documents of Incandescent Light & Power Company to Kennan, the property was still in the hands of the assignees, who later sold it. The assignees operated the property for a certain period of time, the length of which I do not remember. I think Burt Foster or some relative—his wife I believe—bought the property and sometime thereafter the Seminary Street generating plant was dismantled and they built a plant, which still stands in the valley south of the Wheeling & Lake Erie tracks. The buildings are there now and I think they have some machinery. It was a sort of combination of gas and electric plant. Aside from the change in the place and the building, there has been no change in the distribution system and in the location of the poles and wires in the streets. The two systems for commercial and domestic use were still continued and the physical property, wires, poles and insulators have continued to be operated right along and are operating at the present time. I would not say that the same poles are there. As they decayed, they replaced them, but it is the same system and same location and, in some instances, the same wire.

After Foster acquired the property, a corporation was organized as I understood known as The Northern Electric Company and thereafter several changes were made and the property was finally taken over by the Cleveland Southwestern Traction Company. When The Cleveland Southwestern Traction Company, subsequently known as The Cleveland Southwestern & Columbus Railway Company took over the property, the same poles and lines, which had been originally constructed by the partnership were still in use with no change in the location.

I remember that the Municipal Light Plant of the City of Norwalk went into operation in 1914 or 1915, and up to that time The Cleveland Southwestern Railway Company had been supplying electricity for the City of Norwalk, both domestic and commercial, and the only change in the manner of producing and in the manner of transmitting electric energy throughout the city was the discontinuance of the arc light with the expiration of the contract with The Cleveland Southwestern.

During the existence of the corporation known as Incandescent Light & Power Company, of which I was secretary, and the operation of the same property by the assignees and then by Foster and the successive companies down to the operation by the Cleveland Southwestern Traction Company, the same poles were used for the two sets of wires, one for alternating and the other for

direct current. The direct current was used for the municipal lights and the alternating for domestic and commercial purposes. I think that the present building containing the generating plant was built about 1895 or 1896. There has been no addition to it and it is just as it was originally. It was built for a gas plant, which was discontinued. The partnership never owned the land, upon which it built its original plant. It belonged to Frank Lake and Georgia Rexford. Exhibit U is the lease executed by Lake and Rexford to Norwalk Incandescent Light Company. There was no difference between The Incandescent Light Company and The Norwalk Incandescent Light Company, both names referring to the partnership.

Before the formation of the partnership, a corporation known as Western Electric Company had a plant on Woodlawn Avenue and furnished direct current for city streets. It furnished the first street lighting used in Norwalk. It had probably been in operation ten years before the partnership commenced to operate. Western Electric Company furnished electricity only for street lighting. It ceased to do business after the formation of the partnership in 1890. After the partnership commenced to furnish electricity for lighting, Western Electric Company took their machinery out of town. Western Electric Company did no incandescent lighting. The first incandescent lighting in the City of Norwalk was furnished by the partnership, with which I was connected. There was no difference between the character of the business carried on by the partnership and the character of the business carried on by the corporation.

A man of the name of D. C. King, who was one of the incorporators of The Incandescent Light & Power Company is dead. When Dr. Vail died, he was a resident of the State of Washington. When the quo warranto case against Ohio Electric Power Company was commenced, I was City Solicitor and we tried to locate Dr. Vail, but he did not live long after he was located and, at the time we learned where he was, I understood his health was very bad and that he died in a short time thereafter.

The partnership built the original plant, installed the machinery and extended the lines, and the money was furnished by the partners. It is hard to say how much money they expended, but I estimate it at $35,000 or $40,000.

There was no property that was not included in the transfer to the corporation. When the property was

turned over by the partnership to the corporation, Mr. Dunmore and one or two other parties interested and I appeared before the Council and Mr. Dunmore thanked the members of the Council very kindly and we left.

"Q. And then did the corporation continue in the same way with the city? A. Yes.

"Q. Was its relation with the city the same as it had been? A. Exactly the same.

"To which question plaintiff objected for the reason it calls for a conclusion."

CROSS EXAMINATION

By Mr. Boxell:

Referring to Exhibit A attached to second amendment and supplement to bill of complaint, the ordinance of the city of July, 1890, the partnership had come into existence sometime before that date, but how long before I do not know. I think it was organized about July 1, 1890. I think the partnership agreement was in writing, but would not say positively. I have no idea where the written agreement is today. If there was an instrument drawn, it was left with me. I kept all the papers, records, everything. The partnership agreement was filed with the rest of the papers and I don't recall of ever seeing it, if it was written. It was mixed up with the rest of the papers that came into the final hearing of the case. The partnership agreement was not transferred to the corporation, but filed with the papers, burned up in the Cutter case. When I was called as a witness in the Cutter case, I was asked to bring the files of the corporation and the papers were all together. If there was an agreement, it was with them. The partnership agreement was in the files of the corporation. All corporation files were turned over to the court in the Cutter case, except the accounts which were turned over to the assignees.

I do not think I was called on to turn over the partnership agreement in the Cutter case, as it had nothing to do with the case. There were no carbon copies of the partnership agreement and I know of no additional copy. I assumed there was a written agreement and if there was the boys signed it and left it with me. I am not saying there was a written agreement, but think there was, and I may be mistaken when I say I turned over the partnership agreement to the court. I have made no special search. I think if I had it, I would have come across it. I don't know where I would look for it, but

I think I had it. Dunmore, Sawyer and Vail were particular fellows and they may have asked for it and taken it away. I may possibly have it, but I do not know where to look for it. I haven't the slightest idea.

I do not know in what proportion the partners contributed to the expenditure of $35,000 or $40,000 and could not recall approximately. There were five or six partners. While there was quite a little money contributed by the several partners, there was not $35,000 contributed, because there was some liability and the partnership had to assume it. The partnership assumed such liability in the course of its business and when the corporation was formed, they took it over. I do not believe that actually $35,000 or $40,000 in money was paid in and I couldn't tell the actual amount which the partnership put in. The equipment had cost that much and we were liable for some balance that did not actually go in. The partners were all jointly liable. We entered into the partnership on an equal basis. It was the purpose of the partnership, upon its formation, to form a corporation. That was the original purpose and it was contemplated that the partnership should have stock issued to them in proportion to the amount of money they had actually put into the partnership. There was a difference in the amount of stock held by the respective partners, depending upon the amount of money they put in. When the corporation was formed, each partner received stock in proportion to what he had put in. The name of the corporation which was formed in 1891 was The Incandescent Light & Power Company.

The city has not changed much in reference to its area since 1891. I think the corporation lines are today substantially the same as they were in 1880.

I do not think the partnership actually installed poles and wires in the city until they received that franchise. When I refer to the franchise of July 30, 1890, I refer to the ordinance which the City Council of Norwalk passed on the evening of that day, Exhibit A attached to second amendment and supplement to bill of complaint in this case.

The incorporators of The Norwalk Incandescent Light & Power Company were identical with the partners of Incandescent Light Company, with the exception of D. C. King, who I believe, was not a member of the partnership, but I wouldn't say positively. It is possible he was a member of the original partnership. If he was one of the partners, then they and the incorporators of The Norwalk Incandescent Light & Power Company were the same.

The partnership made an application to the council in July, 1890. No written application for an ordinance was presented, other than the ordinance itself. I have no copies relating to an application. Mr. Dunmore and I were present at the meeting of the council and asked for certain privileges in the city. I do not recollect who prepared Exhibit A attached to second amendment and supplement to bill of complaint, the ordinance of July 30, 1890, but it was presented to the council. I do not know who prepared it, unless I did. When Exhibit A attached to second amendment and supplement to bill of complaint was submitted to the council, I wouldn't say that I notified the council that it was the intention of the partnership to form a corporation and turn whatever rights the city might give to the partnership over to the corporation, because I don't remember, nor do I recollect that Mr. Dunmore said anything of the kind.

It was the partnership's intention to form a corporation. Council meetings were not held so formally those days. I think the council was composed of six or eight members and we would get around the table and talk about this thing, and this one would spring this and this one that, and there were a lot of things said. The matter contained in Exhibit A attached to second amendment and supplement to bill of complaint (ordinance of the city dated July 30, 1890) was read in the usual way, but no discussion by the council ensued therefrom. There might have been some discussion before among the members, but not as a body, in the presence of Mr. Dunmore and myself. We were all around the table. It was made evident to council that the ordinance contained the words that the rights purported to be granted by it should accrue to the partnership, its successors and assigns, and the council members knew that. There was one or two pretty good fellows on the council at that time. The fact that the words "successors and assigns" were in the ordinance as presented does not refresh my recollection as to whether or not the corporation was discussed at the time.

The same procedure was followed with respect to Exhibit B attached to second amendment and supplement to bill of complaint (ordinance of the City of Norwalk passed October 7, 1890). The ordinance of October 7, 1890, was presented to the council already prepared, with no written application. Mr. Dunmore and I very frankly told the city council what we proposed to do. A matter of that kind is often taken up before with each individual councilman and talked over. They in-

vestigate those things and when they come to the meeting of the council they perhaps had some questions to ask. We gave them what information we could with reference to it and after they got the information they went into session and passed the ordinance.

I do not recall that there was any discussion by the council members on Exhibit B attached to second amendment and supplement to bill of complaint. The only thing I remember about it is my attention was called to the kind of system. When my attention was called to the ordinance, Exhibit A attached to second amendment and supplement to bill of complaint (ordinance of July 30, 1890), they insisted upon the installation of the Heisler system, and I remember there had been a change and I think some of the members of the council had been informed it was not the system we should have in the city.

Prior to the passage of both the ordinances, we had some discussion with individual members of the council and didn't spring it all of a sudden; various questions were put to us by members of the council both prior to the meetings and at the meetings, with reference to the partnership plans and we put our cards on the table and didn't withhold any information from the council and they were glad to have us come in and we told them what our plans were.

The transfer by the partnership to the corporation was in writing and it is my impression it was in the character of a bill of sale. It was a written transfer of the property to the corporation and was not recorded in any of the county or city offices. I am positive as to that. About the time the transfer was made, Dunmore and I went to council and talked the matter over and I don't doubt it was talked over before and, when the council convened that night, one of them made some kind of a—I don't think it was a written resolution—confirming the transfer from the partnership to the corporation, and we didn't stay long. I think Mr. Vail was with us, but I am not sure. The council took action upon that request and confirmed our action as partners in transferring the partnership property to the corporation, but I couldn't tell you what the character of the application was. Before leaving, Mr. Dunmore thanked the council for doing what they had done, and we left, for our business was over.

At the meeting of July 30, 1890, when the ordinance of that date—Exhibit A attached to second amendment and supplement to bill of complaint—was passed, Mr. Dunmore thanked the council for passing the ordinance.

He invariably thanked the council. He was just that kind of a fellow. He accepted the grant, and the same procedure was followed, after the passage of the ordinance of October 7, 1890. There was no written acceptance on either occasion. The transfer from the partnership to the corporation was signed by all of the partners and after that we asked the approval of the council to the transfer. The matter of their approval I don't doubt had been taken up with them individually prior to that occasion. There is no question but what the council had been acquainted with the fact that a corporation was being formed. That is the way we do things in a little city, go and see them before.

During the time the partnership operated the plant and the distributing system in the city for electric current, some additions were made to the system and there was a constant expansion all the time and when demands were made for additional lights, we put in the necessary equipment and extensions were made from time to time and the corporation, also, made extensions from time to time. I would not say that these extensions substantially covered the city for people were not using incandescent lights then like they are today. A good many streets did not have them, excepting arc lights, but the incandescent system covered the city, so far as there was a demand for domestic use, and whenever the city desired arc lighting and wanted a light we put it in and that required equipment. I had nothing to do with securing permits from the city authorities for the partnership and corporation, but I expect they secured permits. Mr. Dunmore did that. He was general manager. In those days, there was a street commissioner and we would tell him we wanted to locate a pole or do some work and it was granted without a permit. The street commissioner is called a director now, director of public service, and he performs the same functions with reference to the use of the streets.

All the properties that the partnership had, whatever character they were, were conveyed to the corporation, which succeeded it, and the corporation, The Incandescent Light & Power Company, conveyed all the same property to the assignees, Foster and Jones, and then all of this property with the extensions or additions was transferred by them to Mrs. B. P. Foster and a man of the name of Jones.

About 1895, I understand that The Northern Electric Company, a corporation, was formed by B. P. Foster. It was Burton Foster's Company, but I do not

know which one preceded the other. At that time, the old generating plant was dismantled and The Northern Electric Company erected a new brick plant located in the valley by the Wheeling & Lake Erie tracks, and the location of the present Ohio Electric Power Company is the same place and the same building.

After the formation of The Northern Electric Company and its acquisition of the properties, I suppose it made extensions to the lines in the city, but not to any large extent. My understanding is that the same system of transmission by poles and wires, which the partnership and the successor corporation had, was connected with the new generating plant on Water Street, and this same system with the replacements which have been made from time to time, poles and wire extensions covering substantially the same streets, alleys and places in the city, is the same system that was used by The Northern Electric Company and the companies which succeeded it down to Ohio Electric Power Company and is still being used now. The successor to The Northern Electric Company furnished street lighting for the city to about the time of the erection of the Municipal Plant in 1913 or 1914. It might have been about 1915. I am not familiar with the date, having had no occasion to look it up.

During the period from 1890 to the present, there was no concern, outside of the successors of the original partnership distributing electric current in the city, either to the city or private consumers, unless it might be some private concern. I do not know of any public utility. No outside company offered any service.

RE-DIRECT EXAMINATION

By Mr. Craig:

Refreshing my recollection, I remember that Mr. Craig asked me to make an extensive search of all my files to see if I could find any of the papers or records of the corporation, and I made that search and could find no trace of any Incandescent Light & Power Company's papers or any writing covering the transfer of all the items or the partnership agreement. I don't know where to look for any such papers. I recollect Mr. Craig requesting me to make a search and I did look where I usually keep old papers, but I did not expect I would find any and I didn't find any. I have nothing at all in any shape or form.

Mr. Vail was one of the partners. I said something about his being an incorporator, but he might have been out of town. The law required five I believe, I don't recall whether King was a partner. There were a few of those fellows I knew were partners, and one or two of the other fellows I don't know. I can tell you the fellows I know were partners but there are one or two I wouldn't want to say. When the partnership was organized and at the time it acquired the ordinance passed by the council July 30, 1890, I do not recall that there was any fixed time within which the corporation would be organized. We had no definite plans, but during the time of the organization I recall talking it over with some of them. I recall talking about incorporating the company.

RE-CROSS EXAMINATION

By Mr. Boxell:

Dr. Vail was one of the original partners.

RE-RE-DIRECT EXAMINATION

By Mr. Craig:

People who had nothing to do with the original organization became stockholders.

W. R. Huntington contributed the greatest amount of money as a stockholder. Mr. Huntington was not connected with the partnership. I think his business must have been spending money. At one time, he was connected with some coal business. He and Ed Sawyer were very warm friends.

RE-RE-CROSS EXAMINATION

By Mr. Boxell:

Upon the transfer by the partnership, the original partners at that time or thereafter received their stock in payment of the transfer and each one became a stockholder, that was for each one's share in the partnership, whatever it was. Just what their interest was, I do not remember.

W. R. Huntington was name of the man from Cleveland. He took stock after the organization, after the partners received their share of stock in the corporation.

NARRATIVE STATEMENT OF DEPOSITION OF BURTON P. FOSTER,

Taken on behalf of the Plaintiff

The plaintiff offered the direct and redirect examination in the deposition of Burton P. Foster and the defendant offered the cross examination therein. Both were received as read by the court subject to objections and exceptions hereafter set forth.

DIRECT EXAMINATION

By Mr. Boxell:

My name is Burton P. Foster and I reside at, and have been a resident of, Toledo, Ohio, about five years. I lived in Norwalk, Ohio, from 1895 until 1899 and there operated the electric light and gas plant supplying the City of Norwalk. I had been in the same business since 1888 and when I went to Norwalk in 1895, I organized an Ohio corporation under the name of The Northern Electric Company with its place of business at Norwalk.

Plaintiff's Exhibit 6 appears to be the Articles of Incorporation of The Northern Electric Company, which I formed. Upon going to the City of Norwalk, in 1895, I purchased the property of The Incandescent Light & Power Company from its trustees at an assignees' sale and at public auction. I personally attended the auction in the City of Norwalk and directed the assignees to make the conveyance to my wife, Mayme C. Foster, and George P. Jones.

Plaintiff's Exhibit 5 appears to be a deed of sale by the assignees to George P. Jones and Mayme C. Foster and is the deed covering the property, which I purchased from the assignees of The Incandescent Light & Power Company. The property which I purchased from the assignees of The Incandescent Light & Power Company embraced a plant for the production of electric energy. I purchased no real estate.

The deed identified as Exhibit 5 was duly delivered by the assignees to Mrs. Foster and Mr. Jones. Upon the delivery of that deed by the assignees to Mrs. Foster and Mr. Jones, the assignees delivered to Mrs. Foster and Mr. Jones a plant in the City of Norwalk for the production of electrical energy.

The power plant was located on Seminary Street on leased ground. There were delivered with the power plant all the poles, wires, lamps and other paraphernalia owned at that time by The Incandescent Light & Power

Company constituting an electrical distribution system through the City of Norwalk. The distribution system embracing private lighting and public lighting covered practically all the corporate limits. By "public lighting" I mean lighting the city streets and also incandescent lights for the city offices.

As nearly as I can remember, the purchase price for the property was paid by a check that was given to the assignees. The price paid was $13,500.00.

The property embraced by the deed by the assignees of The Incandescent Light & Power Company to Mrs. Foster and Mr. Jones, and delivered to them, was subsequently conveyed to The Northern Electric Company.

Plaintiff's Exhibit No. 7 to my best knowledge is the deed conveying the property acquired from the assignees by Mrs. Foster and Mr. Jones to The Northern Electric Company. That deed was delivered to The Northern Electric Company. The property, which Mrs. Foster and Mr. Jones acquired from the assignees of The Incandescent Light & Power Company, was delivered by them to The Northern Electric Company. I left Norwalk for a short time upon acquiring the property of The Incandescent Light & Power Company. The property was then in operation, the plant being used to generate electricity, which was distributed over the distribution system both for public lighting and for commercial lighting to private consumers.

One of the assignees, J. W. Foster, was then in charge of the plant and I told him to continue the operation in the same manner as he had been doing. I was absent from Norwalk about one month or possibly longer. I was living at Toledo at the time and went to Norwalk possibly twice a month. Upon formation of The Northern Electric Company, I retained the services of J. W. Foster to manage it for several months and he was in charge and took his directions from me. I controlled it.

Prior to the formation of The Northern Electric Company, I was approached by the manager who had charge of negotiations with the city with reference to a lighting contract with the City of Norwalk for public lighting. There was some discussion with the city with respect to a lighting contract through him.

After the property of The Incandescent Light & Power Company had been conveyed to The Northern Electric Company and after the latter company had obtained a contract from the City of Norwalk for a ten-year period, it proceeded to build a new plant on its own

property along the lines of The Wheeling & Lake Erie Railroad, about four blocks distant from the plant that was being operated under The Incandescent Light & Power Company. By "the ten-year contract" I mean a street lighting contract with the city. The Northern Electric Company acquired a new piece of real estate along The Wheeling & Lake Erie. The plant which it erected on this property consisted of a brick building about sixty by eighty feet; one hundred and twenty foot smokestacks, with a pond connected for the supply of water on compound condensing engines. At that time, a very new and up-to-date plant. The electrical machinery and appliances, switch-boards, etc., used by the former plant were put in the new plant. New compound condensing engines and new boilers were installed. As soon as the new plant was ready, The Northern Electric Company dismantled the old plant on Seminary Street, but during the period while the new plant was under construction it continued to operate the old plant on Seminary Street and distribute electric energy for public and private purposes in the City of Norwalk in the same mode and manner as was being done when Mrs. Foster and Mr. Jones acquired the property from the assignees.

The new plant was of double the capacity required for producing electrical energy for both the public and private needs of the City of Norwalk. I mean the power part of it, the engines, boilers and buildings. At that time, the distribution system in the city was sufficient to care for the needs of the city in its public capacity and for its citizens in their private capacities.

Q. As nearly as you can remember, Mr. Foster, what was the investment of The Northern Electric Company at that time in this new generating plant, I mean in dollars and cents?

Mr. Eversman:

We object to that on the ground it is not the best evidence, and for the further reason that it is irrelevant and immaterial.

A. Including the original purchase from the assignees, and the cost of the new plant, at the time we had the new plant in operation, we had expanded, as near as I can remember, between forty and fifty thousand dollars. When the new plant was put in operation, the then existing lines for the distribution of electrical energy in the city were connected with the new plant and disconnected from the old one.

Q. Prior to the construction of the new plant by The Northern Electric Company, did you have any con-

versations with officials of the City of Norwalk with reference to the construction of a new plant?

Mr. Eversman:

We object to that as being irrelevant and immaterial.

A. Undoubtedly, but I can't say specifically.

Q. You mean by that which ones? A. Which ones, yes.

Q. Did you or did you not acquaint city officials at that time with your intention to construct a new modern efficient plant for the generation of electrical energy?

Mr. Eversman:

We object to that on the ground it is entirely irrelevant and immaterial, and for the further reason it asks for a conclusion.

A. I did.

The new plant was constructed and put in operation as near as I can remember in November, 1895, late in the fall of the same year that the properties were acquired by The Northern Electric Company.

In 1897 The Northern Electric Company acquired some gas properties, and, on acquiring the gas pipe lines of The Northwestern Ohio Gas Company, it changed its name to The Northern Gas & Electric Company. To the best of my knowledge, Plaintiff's Exhibit No. 6 has attached to it a certified copy of an amendment of the articles of incorporation of The Northern Electric Company changing its name to The Northern Gas & Electric Company. I must have signed the certificate as secretary of The Northern Electric Company. I was in absolute charge of the company from the time I purchased The Incandescent Light & Power Company until The Northern Gas & Electric Company was disposed of in 1900. That year, I sold my stock in The Northern Gas & Electric Company. From the period of the incorporation of The Northern Electric Company until I sold my stock, including the change of name to The Northern Gas & Electric Company, the company continued the operation of the electrical generating plant and distribution system in the City of Norwalk, distributing electricity for street lighting and other public purposes and to private consumers. It was necessary from time to time to set new poles in the street and to make alterations in, and extensions to, existing lines in the street. My company made those changes and extensions. Those changes and extensions were made in accordance with the type and mode of construction, which were in existence generally when I went to Norwalk.

Q. You may state whether or not throughout the period of your operation of the properties, your company continued in the same mode of use of the streets of the City of Norwalk as you found when you went there?

Mr. Craig:

Object to that upon the grounds it is leading, incompetent, and irrelevant.

Mr. Eversman:

It is also a conclusion.

A. It did.

During the period from 1895 to 1900, my company supplied electrical energy to all private consumers, who desired it, under the rules of the company. Naturally I thought that throughout this five-year period, the plant and distribution system of the company was maintained in a modern and efficient operating condition. I am positive it was. To my knowledge, there was never any objection made by any official of the City of Norwalk during this five-year period to the manner in which my company used the streets.

About $2,500.00 per year was the net revenue derived by the company from the ten-year street lighting contract of 1895.

During the five-year period I was in Norwalk, the population of the city was slightly in excess of seven thousand people.

CROSS EXAMINATION

By Mr. Craig:

I am now living at 2230 Lawrence Avenue, Toledo, Ohio. I have been living in Toledo about half the time during the past five years and largely the other half of the time I have been engaged in business in Oklahoma.

I am quite certain I bid for the property that was sold by the assignees of The Incandescent Light & Power Company on February 12, 1895. As soon as I paid the $13,500.00, the purchase price of the plant, it was operated by Mayme C. Foster and George P. Jones, who was my partner in business at Findlay, Ohio, under the management of J. W. Foster, until the organization of The Northern Electric Company in May, 1895.

The contract for furnishing arc lights for street lighting in the City of Norwalk, as near as I can remember, was made in July, 1895, and the same property that had been operated by The Incandescent Light & Power Company and by Mrs. Foster and Mr. Jones was op-

erated by The Northern Electric Company until the generating plant was moved from Seminary Street to the new location on Water Street.

Defendant's Exhibit G appears to be the contract that was executed by The Northern Electric Company by George P. Jones, its president, and myself, its secretary, with the City of Norwalk under date of July 16, 1895, and it is the same contract to which I have referred. There was only one street lighting contract to my knowledge made by The Northern Electric Company with the City of Norwalk.

Defendant's Exhibit A is a photograph of the generating plant constructed by Northern Electric Company in 1895. The appearance and outlines of the building seem to be exactly like what I built myself in the summer and fall of 1895.

I may be mistaken when I say that I thought the new plant was in operation in November. It may not have commenced operation until January.

I operated the same line of poles and the same line of wires in the streets which were operated by Mr. Foster and Mr. Jones after I paid them $13,500. We used the same poles for both purposes, for lighting the streets, and, also, for commercial lighting, including incandescent lighting, carrying one line of wires that furnished alternating current and another line of wires that furnished direct current.

I made a promise to the council that in the event they would give me a ten-year contract I would build them a new, complete, up-to-date plant and whatever I put into the contract for street lighting I tried to comply with, in the construction of the building that is shown in Exhibit A, to the best of my ability.

Outside of the council chamber and the mayor's office, the city was to pay 15c per one thousand kilowatts for incandescent lighting at the city's headquarters and police station. All wires were carried on the same poles for all purposes.

After I had built the plant on Water Street and as soon as I purchased the pipe lines of The Northwestern Ohio Gas Company, I added a gas development plant in conjunction with the powerhouse, which I had previously built. I did not have the acquisition of the gas business in contemplation, when I bought the electrical property.

I remember that I testified as a witness in a quo warranto proceeding, in which the State of Ohio was plaintiff and the Ohio Electric Power Company was defendant, in relation to the same situation, and I believe

that I testified in that case that the entire expenditure for construction of generating plant shown in Exhibit A was about $25,000.00. That was the amount as nearly as I can recollect that I put into the improvement.

I remember where the city offices were located in the Whittlesey Building and I remember that the mayor had an office in that building; that the city clerk had an office, and that the police station was located in the same building. I believe the waterworks office was, also, located therein. If I remember correctly all those rooms and apartments were lighted with incandescent lights, and the wires that carried the current to those incandescent lights in the various offices and apartments came from the transmission wires on the pole lines that were purchased by Mrs. Foster and George P. Jones, and from the same generating plant. Only one row of poles carried them, and on those same poles were lines for incandescent lights and separate lines for street lighting.

I sold my stock in The Northern Gas & Electric Company to a man, whose name was Fuller, and after I left Norwalk the property was later acquired by The Cleveland & Southwestern Traction Company. I left Norwalk in the fall of 1899 and disposed of my stock in 1900. I left the property in the hands of a manager to look after the operation of it, and dictated the policy of the company until I sold my stock.

RE-DIRECT EXAMINATION

By Mr. Boxell:

When I testified in the quo warranto case as to the investment in the new plant by The Northern Electric Company, I meant approximately $25,000.00 and to explain the difference between the $40,000 and $50,000, which I testified had been invested, I will say we had put in $13,500.00 originally, and then about $25,000.00 for the new plant, and then I think we borrowed $5,000.00 from Gardiner's Bank in Norwalk.

Q. Now when you erected the new plant in 1895, did you do that solely upon the faith of having secured a ten-year lighting contract with the City of Norwalk?

Mr. Eversman:

We object upon the ground that it asks for a conclusion; wholly irrelevant and immaterial.

A. I did not.

Q. Did you or did you not have in mind that your

company from this new plant would serve private consumers throughout the City of Norwalk?

Mr. Eversman:

We object upon the ground the question is leading, and further that it is irrelevant and immaterial.

A. I did.

Q. What did you have in mind in addition to the ten-year lighting contract in erecting your new plant?

Mr. Eversman:

We object upon the ground that it calls for a conclusion and is irrelevant and immaterial.

A. At that time we had the same idea that in operating or building a public utility we had the same rights and privileges as any other manufacturing establishment. It was permanent so far as the rights of furnishing private lighting was concerned.

Mr. Eversman:

We ask that the answer be stricken upon the ground it is not responsive to the question.

Q. What was your purpose in organizing The Northern Electric Company under the laws of the State of Ohio, as a corporation under the laws of the State of Ohio?

Mr. Eversman:

We object to that question upon the ground the Articles of Incorporation are the best evidence as to what the purpose of the corporation was.

A. At that time, it was customary for all public utilities to organize under the laws of a state. It gave us certain rights and privileges.

Mr. Eversman:

We ask the answer be stricken upon the ground it is not responsive to the question.

Q. What rights and privileges in the nature of a franchise did you have in mind?

Mr. Eversman:

We object to that question for the reason that it asks for a legal conclusion and also is irrelevant and immaterial.

A. Continuous rights and privileges so far as private lighting was concerned.

Mr. Eversman:

We ask the answer be stricken because it is not responsive and is a statement of a legal conclusion.

Q. Do you mean by that the right and privilege of furnishing electricity to private consumers under the state laws of Ohio?

Mr. Eversman:

We object to that upon the ground the question is leading and for the further reason it asks for a legal conclusion, and for the further reason it is immaterial and irrelevant.

A. I did, at that time, because an electric light or power company, when once established, was considered to have the same rights and privileges of any gas plant which was permanent.

Mr. Eversman:

We ask that the answer be stricken for the reason that it is a statement of a legal conclusion and particularly, the last sentence there.

Q. Did you make any communication to the City of Norwalk with reference to your purposes or your intentions to organize The Northern Electric Company prior to its organization?

Mr. Eversman:

We object to that for the reason it is wholly immaterial and irrelevant.

A. Possibly.

Q. Do you recall whether or not you had any discussion with city officials relative to the organization of this new company prior to its organization?

Mr. Eversman:

We object for the reason that the question is irrelevant, immaterial.

A. No doubt I did.

Mr. Eversman:

We ask the answer be stricken out on the ground it is not responsive.

Q. With reference to the manner of use of city streets by companies organized under the laws of the State of Ohio, for the generation and distribution of electric energy to private consumers, at the time of forming The Northern Electric Company, what understanding, if any, did you have as to whether or not there had been any regulation by the City of Norwalk as to the manner in which its streets should be used?

Mr. Eversman:

We object to that; first, because it asks for a legal conclusion, and, second, because it is entirely irrelevant and immaterial.

A. If I remember correctly, all cities in which public utilities were operated at that time provided ordinances regulating how poles and wires should be placed, and I think there were such ordinances existing at the

time under which I purchased this Incandescent Light & Power Company.

Mr. Eversman:

We ask the answer be stricken because it is not responsive to the question, and for the further reason it states a legal conclusion. The answer is the statement of a legal conclusion and is not the best evidence of the ordinance of the city.

Mr. Craig:

And is based on an assumption.

Q. Mr. Foster, with reference to the distribution system which existed in the City of Norwalk during the time you were there and operated The Northern Electric Company, were there some lines, by that I mean pole lines, in the city which carried, for instance, only lines to private consumers, by that I mean as distinguished from poles which carried lines for public purposes and private both? A. The public lighting required a development of poles and lines which covered practically all the City of Norwalk inside of its corporate limits, and we used the same poles for carrying private lighting as well as public. Occasionally, we made extensions both for public and private lighting.

Q. And were there some extensions on some lines which did not carry both lines serving public lighting and private lighting? A. There possibly were.

Q. Mr. Foster, with reference to the ten-year lighting contract entered into in 1895, that is Exhibit G, what is your understanding and what was your understanding at the time with reference to whether or not at the expiration of that ten-year period your company was compelled to discontnue serving private consumers in Norwalk and to take down the poles and lines serving those private consumers?

Mr. Eversman:

We object to that for the reason it asks for a legal conclusion, and for the further reason the contract speaks for itself, and therefore, the question is irrelevant and immaterial.

A. No such idea ever entered my head. I surely wouldn't have built and put on the improvement that I did for merely the street contract lighting.

Mr. Eversman:

We ask that the last part of the answer be stricken for the reason that it is not responsive to the question and for the further reason it is irrelevant and immaterial.

Q. At the time of the construction by The Northern Electric Company of its new plant in 1895, you may state whether or not you would have gone to the expenditure in constructing the plant which you did had you possessed any idea that, upon the termination of the ten-year lighting contract, you would have had to discontinue service to private consumers?

Mr. Eversman:

Objection to the question on the ground it is wholly irrelevant and immaterial.

A. I surely would not.

Q. You may state whether or not you would have gone to any such expense solely upon the faith of a ten-year lighting contract with the City of Norwalk?

Mr. Eversman:

Object to the question on the ground it is irrelevant and immaterial.

A. I would not.

Thereupon the plaintiff called as a witness in its behalf

CLARENCE J. TAYLOR,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Welles:

I am Clarence J. Taylor and reside at Lima, Ohio, and am engaged in the financing and insurance business. I have been engaged in the electric light and power business. I have been in utility work practically all my life, until 1924. From 1910 to 1913, I was connected with a company which had to do with the operation of the electric light and power plant and distribution system at Norwalk, Ohio, and then as advisor until 1916,

in fact I advised my successor there almost to 1920. From 1910 to 1913, I was local manager and from 1913 to 1916 I acted in an advisory capacity. Mr. Frederici was my successor there. From 1910 to 1916, I was familiar with what was being done by the operating company at Norwalk. It was The Cleveland & Southwestern Traction Company, which afterwards was known as The Cleveland, Southwestern & Columbus Railway Company.

In June or July, 1910, I went from the auditor's office at Cleveland and became power and light manager at Norwalk. At that time, the company had a single-phase line furnishing power for residence and commercial purposes and an arc lamp line, using the old Brush arc lamps, which furnished the street lighting. The The single-phase system consists of two wires with a positive and negative; while the three-phase system is a three-wire system, the third wire being considered a ground wire. Both the single-phase system and the three-phase system carried alternating current. The arc light system was a separate system, the voltage of which I do not remember, but it was a direct current line at that time.

When I went there, the alternating system was a single-phase system and we commenced to change over to the three-phase, the three-wire system, in 1911, and it went on through until 1916, when it was changed again. The change from the single-phase system to the three-phase system was accomplished by putting an additional wire to the pole line system. When I came there, the line was in very bad shape—the entire pole line; some of the wires were badly worn where they passed through the trees, and the entire system had to be overhauled, a number of new poles set, and wires added in some places to other wires, depending upon the condition of the wires already installed.

The officials of the city called our attention to the fact that we had to fix up our pole line and, also, our wires, due to the fact that they were getting arcs in some of the trees; some of the poles were in very bad condition, rotting at the ground and leaning, and it was dangerous for the public. Once or twice a year during every year while I was manager there, I received such communications from the city officials, generally the mayor or the clerk of the council. During that perod, there was Mayor Anderson and, I think, Mayor Martin served part of the time. I think there were three different mayors, there may have been only the two. While

I was there, an additional line was run to what is known as The Pressing Canning Company and The Norwalk Drilling Tool Company. There was a new line from the power plant just a short distance to The Himberger Lumber Company to take care of a motor installation.

The streets or public ways of the City of Norwalk were used for all those lines. We always had to get a permit from the mayor of the city any time we were going to change a pole or make any repair work, and we were never refused such permit upon application.

I would not know how much was spent by the operating companies I have named, during the period from 1910 to 1916, for maintenance, repairs, improvements and extensions of the plant and distribution system, but it must have run safely a minimum of between $20,000.00 and $25,000.00, I should say. During that time, the operating company maintained its plant and distribution system in substantially continuous operation, and electrical service was furnished during that period to any of the residents who applied for it.

I lived in Norwalk until April 1, 1924, but I did not give the situation as much of my time as I had prior to 1916. From 1916 to 1924, I know that the different operating companies continued to render substantially continuous service to those of its customers who desired that service, and during the entire period of my familiarity with this plant and distribution system, it was the only electric light and power plant and distribution system in the City of Norwalk, except a system installed by the city itself in about 1915. It was the only private company there. The generating plant of the private company was not in operation at all times. We received our power through a motor generator set from Elyria coming over a high tension transmission line and, whenever our load got heavy, we cut in the steam engine and drove our large generator or, in case of a storm between Elyria and Norwalk which interrupted the service on the high tension line, we cut in the steam engine and kept the boilers fired up at all times, with the boilers banked, requiring only a few minutes to start the steam generator. The high tension wires from Elyria were connected with this system prior to my going to Norwalk to take charge of it. The high tension line was built clear through to Norwalk, where we had a booster for the railway end, and the same transmission system handling the railway handled our power end at Norwalk. The railway, I think, after I left Norwalk was

wrecked between Oberlin and Norwalk. It was the same company at Elyria that furnished this power.

"Q. You may state, Mr. Taylor, while you were there in charge of this plant, and during the period when you were giving it close supervision, that is, the whole period from 1910 to 1916, whether or not the company complied with different orders, directions, or regulations, that were issued by the city or by the city officials with respect to the mode of the use of the street, the keeping up of the property, and so on? A. I think it did.

Mr. Craig:

Objection to that, if Your Honor please.

The Court:

I will admit it anyway. You can cross examine him on it. What is the objection?

Mr. Craig:

On the ground that it is too general, and would involve better evidence in the nature of record evidence and so on.

The Court:

I think we will let it stand. If you want to go into the detail of it, you can do it on cross examination.

Mr. Craig:

Exception."

CROSS EXAMINATION

By Mr. Craig:

Prior to my coming to Norwalk in 1910, I had been in the employ of The Cleveland & Southwestern Traction Company, which changed its name to The Cleveland, Southwestern & Columbus Railway Company and was the same corporation. It had a railway line extending from Oberlin to Norwalk and had acquired the generating plant and distribution system at Norwalk when I went there. I was local agent for the company at Norwalk. The company had a private right of way for its railway practically all of the way from Oberlin to Norwalk and the greater portion of its high tension line, over which electricity was transmitted occupied that right of way, except that the high tension line went around the intervening villages between Oberlin and Norwalk, rather than occupy the railroad right of way within the limits of the villages.

The booster service supplied for the operation of The Sandusky, Norwalk & Mansfield Electric Railway Company, of which I was receiver, received its electricity from the same generating plant, over the same

high tension transmission line. No part of the high tension transmission line was on the streets of Norwalk, except as it crossed streets.

The Cleveland, Southwestern & Columbus Railway Company was required to keep all wires along the streets for commercial service insulated and the majority of complaints, which I received from the city authorities, related to defects in wiring and rotted poles. When I went to Norwalk, both the poles and wires were old and I would only replace poles as they rotted off at the surface of the ground and as extensions were made.

The transmission line to the Pressing plant and The Norwalk Drilling Tool Company carried 2200 volts and was strung on new poles, except some of the poles which were already there, located on West Street. At that time, The Cleveland, Southwestern & Columbus Railway Company was supplying the City of Norwalk with arc lights under a contract, which expired August 31, 1915. Some time prior to 1915, there was talk in the City of Norwalk relative to the construction of a municipal electric light plant. The talk, in relation to the construction of a municipal plant did not spur my company to go ahead and make improvements, as these improvements were commenced in the fall of 1910. I would say that all the money for improvements was used on the distribution system within a period of more than two (2) years prior to the first of January, 1916.

I was appointed receiver of The Lake Erie & Bowling Green property in July, 1913, and I directed a number of new poles to be erected and constructed some of the three-phase system, before I went out of there as manager and Mr. Frederici came in. I remember that F. E. Myers, president of The Cleveland, Southwestern & Columbus Railway Company, and Mr. Wolfe came to Norwalk just after the passage of the ordinance for the issuance of bonds for construction of the municipal plant and had an open meeting with the council, and I remember they stated it was their purpose immediately to rehabilitate their system, so as to render more adequate service. There had been considerable complaint by the citizens of Norwalk on account of interruptions in the service. These complaints, I think, came more from our commercial users than resident users.

At that time, our current was coming in over the high tension line from the generating plant of The Cleveland, Southwestern & Columbus Railway Company at Elyria, except when operating at peak load. In 1912, I was appointed receiver of The Sandusky, Norwalk &

Mansfield Electric Railway Company by Judge Killits, and the receivership lasted until 1921 or 1922, and during that time this high tension line was furnishing power for the operation of that railway line, which extended from Norwalk south to Plymouth, a distance of 20 miles, with the addition of another railway line eight miles in length from Plymouth to Shelby, and a railway spur two miles in length. All the electricity for those lines came from the high tension line used by the Railway Company for its service as far as Norwalk, but when our heavy load came on we used the steam unit to take the load off the railway.

I do not remember the capacity of the generators and dynamos used in the generating plant at Norwalk, but they were of sufficient capacity for the requirements of the city, but not for the operation of the railway. The steam unit was for electric light purposes only. The street lighting system used direct current and the commercial system consisted of an alternating current, and both lines were on the same poles. In other words, a single line of poles in the streets carried both systems, the direct current system for the illumination of the streets at night and the alternating current the domestic or commercial service. We had only one pole line. I do not know the age of the poles, but some of them were very old and decayed.

In relation to the $20,000 to $25,000, which I stated in my direct examination were expended for repairs and improvements from 1910 to 1916, I just gave what I thought it amounted to, a minimum of from $20,000 to $25,000, it might have been $50,000. I do not know.

Records of these expenses were, of course, kept in the office.

When the municipal plant commenced business, in the early part of 1916, the other plant was not in want of repairs and we took on about a 40% greater load after that. At that time, there was talk about rebuilding the line in Norwalk, but it was never rebuilt while I was there.

After I became receiver of the two electric railways referred to, I gave three or four days a week to the Norwalk situation, that is to say, three or four days a week I put myself in position so if anything came up Mr. Frederici could come to me and I advised him just what to do. So long as I was in Norwalk, the same two generators were retained and in use. One was a small unit that handled the direct current for street lights. I do not know its capacity in kilowatts. The other was

a generating unit, but I do not know its capacity. I am not able to state what proportion of the $20,000.00 to $25,000.00 was expended for improvements and what proportion for repairs. I would not be able to do that. An improvement might be a maintenance charge but a new line would be a capital account. I do not know where to divide that, because you would have to see what amount was charged to capital account and what amount charged to operating expenses. I do not know how much of this estimated amount was charged to capital account.

I do not recall of any new line consisting of an extension, at the present moment, aside from the line to the Pressing plant, which was located about one mile and a quarter from the generating plant.

No part of the $20,000 to $25,000 was charged to the high tension line. The high tension transmission line was in charge of Superintendent Parkes.

In July, 1913, I was appointed receiver of The Bowling Green Light & Power Company and The Lake Erie, Bowling Green & Napoleon Railway Company and from that time on I was off the payroll of The Cleveland, Southwestern & Columbus Railway Company, and from July, 1913, to 1916 I spent half my time at Bowling Green. The extension to the Pressing plant, I am pretty sure, was made before January 1, 1916, in fact before 1915, and before the lighting contract with the city expired. The Pressing extension may have been made in the latter part of 1914.

The line to The Norwalk Drilling Tool Company was an offshoot from the Pressing line.

RE-DIRECT EXAMINATION

By Mr. Welles:

In the construction of the 2200-volt transmission line, some new poles were put in higher than the old ones. The complaints, which we received from the City of Norwalk, related to arcs in trees caused by the wearing off of the insulation on the wire, but our complaints from the citizens were in relation to an outage for four or five minutes when we received a general complaint from everyone. We proceeded to remedy the condition as to complaints received from the city and we tried to eliminate conditions complained of by the citizens.

Before I went to Norwalk as general manager, I had knowledge of the plant and distribution system owned by The Cleveland, Southwestern Railway Com-

pany. As assistant auditor of the company, the reports went through my hands before they went into the general report, and I had occasion to visit the city several times from 1903 to 1910. The poles, the kind of poles, the kind of wiring, the location of the poles, the streets, the heights of the cross-arms and poles were the same and continued to be used in the same way after 1910, as they had been during the previous years.

I think 1912 was the time when I took up with the city council of Norwalk the matter of changing from arc lamps to ornamental street and bracket lighting, and a change of the lighting contract from arc lamps to the new system. A. V. Andrews was our attorney at that time and we discussed a new lighting contract and franchise. I took that matter up on my own authority, without direction from any superior officer or board of directors of the corporation. The following week, the general manager called me to Cleveland and told me I was acting without authority, and I had to go to the city council and advise it that Mr. Snyder had asked me to withdraw my remarks pertaining to a new franchise contract.

After I ceased to be in charge at Norwalk, in 1913, I continued to be a stockholder. I had stock in the company from 1909 until they went through receivership, owning 100 shares of preferred and 400 shares of common.

Thereupon the plaintiff called as a witness in its behalf

RICHARD EARLE FREDERICI,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Boxell:

I reside at Lakewood, Ohio, and was railway agent for The Cleveland, Southwestern & Columbus Railway Company from August 31, 1910, to July 15, 1913, and

then I became manager of the electric light and power company and so continued until November 30, 1922. From 1913 to 1922, I was in charge as commercial manager of the power plant and distribution system of the company in Norwalk and was the successor of Clarence Taylor. During the period from 1910 to 1913, I had some familiarity with the power plant and electrical distribution system and knew that that system was handled through pole lines, wire lines, in the streets and alleys of the city. When I became manager of the plant, I had occasion to make repairs, replacements or extensions. I extended a new primary line on East Main Street from Linwood Avenue east to The Norwalk Auto Parts Company, just beyond the east corporation limits of Norwalk, a distance of about 1¾ miles. There was already a two-phase line a part of the way. I extended another line from Linwood Avenue to the end of the two-phase line and then about that far and built the entire three-phase line from there out to the Auto Parts Company located in the eastern part of the city.

I completed the three-phase primary extension that Mr. Taylor started for the Pressing Company, I think, in 1914. After the Norwalk Municipal Light Plant was completed and in operation, I extended a line on North West Street from Jefferson east to The Norwalk Drill & Tool Company, then north to the roundhouse of The Wheeling & Lake Erie Railway Company. That was a three-phase primary line for 2200 volts. This extension involved the use of new poles, new wires and new construction in general throughout and was put in the streets.

I was familiar with the use of the streets and alleys of Norwalk by the company, prior to 1913, and this manner of construction and use of the streets, in making these extensions, was according to the same manner of use as had been the case prior to 1913, and we probably used a little bit more judgment as far as safety was concerned, than was used prior to 1910. I always received a verbal or oral permit from the director of public service for these extensions. I acquainted him with the facts of what I wanted to do and got his permission to do it, and it was my practice to take it up with a director of public service. A. W. Carpenter was director of public service under Mayor Martin and C. L. French under Mayor Anderson. Mr. Martin, Mr. Venus and Mr. Anderson were mayors during that period of time. Mr. Martin was mayor when the municipal plant was dedicated in September, 1915.

When I took these matters up with the directors of public service, I obtained from them the approval for the doing of the work.

Until the installation of the municipal plant, we were serving both the city for public lighting and any private consumer throughout the city, wherever located, who applied for service; and after the installation of the municipal plant we continued to serve private consumers.

During the period of time when I was manager, the operation of the plant was continuous, and during this period there was a joint use of poles. The company, of which I was manager, used for its lines some city poles, and the city, on the other hand, for its lines, used some of The Cleveland & Southwestern poles. They used what were known as clearance contacts and quite a few poles were so used and the practice was general. When we made a contact of our lines with city poles, I called the matter to the attention of the director of public service, who approved it, and that was true throughout the period.

From 1910 to 1922, there was no other power plant and electrical distribution system in the City of Norwalk, other than that of The Cleveland Southwestern Company and the municipal plant and during that period we were always able to take care of the load by use of the generating plant of the Cleveland Southwestern, except at times. It required quite a load there about 1920. That plant always was in condition ready to render service. From 1910 to 1922, there were three electrical units for generating power, one 200-kilowatt and one 75-kilowatt and a small 110-volt direct current generator, the capacity of which I do not remember. Those generators remained during that period.

CROSS EXAMINATION

By Mr. Craig:

I came to Norwalk in 1910 and left in November, 1922. I know that since then the railway of the company has been dismantled and taken up and I think that occurred about 1924. I have been to Norwalk and have observed the right of way where the railway tracks used to be between Oberlin and Norwalk and the last time I saw it the high tension line from Oberlin to Norwalk, which transmitted electrical energy for the railway, as well as for the distribution system in Norwalk, was still there. That was about four years ago last July. I think

that some of the poles, to which the three-phase system is attached, have been changed, replaced with new ones. I can not say whether the transmission wires are still aloft there—they used to be. During all the time I acted as manager, the greater part of the current used for street lighting and commercial service came from that high tension line and was transmitted from the Elyria powerhouse. The high tension system consisted of a 23,000-volt line, if I remember correctly, which was 25 cycle. That was stepped down by a transformer at the Norwalk powerhouse to a voltage lower than 2300 and cut into a motor that was known as a motor generator set, and that generator regenerated current for the use of Norwalk at 2300 volts, 60 cycle. In a way, it was necessary to have the electricity from the high tension line in order to supply sufficient electricity for the load in Norwalk and, in a way, we could operate a plant of our own there. It was more a matter of cost of operation. The generators in the Norwalk plant did have capacity to carry the full load at all times, but I do not remember the kilowatt capacity, except that our generating equipment amounted to 275 kilowatts. I do not remember when the primary line from Linwood Avenue to The Norwalk Auto Parts Company was constructed. That was extended for the sole purpose of taking electricity to Norwalk Auto Parts plant and carried 2300 volts. While I lived there, the factory of The Norwalk Auto Parts Company burned down and that line was discontinued at that place, but was still kept in operation, because we had extended our primary on further east to East Norwalk for rural service and it was used for purposes inside the corporation as well.

Both the lines to the Pressing plant and to The Norwalk Auto Parts plant, which were located outside of the city, were constructed respectively at the instance of those companies. I recall a meeting held at the city council chamber of Norwalk, addressed by Frank Myers, of Ashland, and Mr. Wolf, of Cleveland, Myers then being president of The Cleveland, Southwestern & Columbus Railway Company, and I think that Wolf was then vice-president or a member of the board of directors. There may have been some discussion about asking a franchise from the city, but I do not recall it. As I recall the situation, Mr. Myers' proposition was that the city could save the bond issue for a plant, if the city would permit the company to rebuild one, and rebuild the lines in Norwalk to continue the operation there. I can not recall anything about a franchise, nor do I recall any talk about one.

I knew of the reconstruction of a single-phase line to a three-phase line, referred to by Mr. Taylor, in his testimony, and that conversion was effected by the addition of a single wire in the majority of cases and in some instances by changing all three wires. The single-phase line consisted of two wires and was an alternating line, and when it was converted into a three-phase, one wire was added to balance the load. The object was to make it possible to serve private consumers.

RE-DIRECT EXAMINATION

By Mr. Boxell:

When I said that the object of the change from single-phase to three-phase was to enable the company to serve private consumers, I did not mean that the company had not been able to serve private consumers before that time, but it was a betterment of service to private consumers.

In addition to the extensions, specifically referred to, while I was manager, the company also made miscellaneous repairs, replacements and betterments throughout its line. The generating plant in Norwalk was used to prepare the current for consumption by the City of Norwalk. We had what was known as a frequency changer, which was connected to a Noyes steam engine and we kept the fires banked under the boilers all the time. In case of a break down in the service between the Elyria powerhouse and our Norwalk station, due to storms, we put the steam plant into operation and operated the Norwalk plant entirely by steam, which was generated at the Norwalk powerhouse. We used the generating plant for the regenerating current coming over the high tension line. The high tension line was known as a 25-cycle, three-phase line, and we made use of the Norwalk generating plant in stepping that power down for use in the city through the operation of the frequency changer. The current was stepped down from 23,000 volts to 4400. The current thus stepped down drove a motor known as a frequency changer which was directly connected to this generator set.

I knew that the 1905 ten-year street lighting contract between the company and the city expired about September 1, 1915, but on that date the city did not at once begin lighting the streets and public places in Norwalk. My company continued to furnish street and public lighting for the city until January 1, 1916, at the same rate, at the request of Mr. Martin, the mayor, and

the director of public service who, I think, was A. W. Carpenter.

The plant of the Auto Parts Company burned down while I was manager and after the municipal plant had been in operation, but the line to the Auto Parts plant was continued to serve private consumers all along the way. G. Ray Craig and C. G. Taylor were two of these consumers.

Thereupon the plaintiff called as a witness in its behalf

JOHN F. KREIDER,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Boxell:

I live at Sidney, Ohio, and have been employed by Ohio Electric Power Company since its organization in 1924. Prior to that time, I worked for another company, which it purchased. I am superintendent of construction work for Ohio Electric Power Company and as such I have superintendence of building extensions to lines and equipment of Ohio Electric Power Company. I am familiar with the lines of Ohio Electric Power Company in the City of Norwalk and have had occasion to be over those lines at numerous times and as late as yesterday.

In 1925, I made a blueprint of the system of Ohio Electric Power Company in Norwalk, which is Exhibit No. 48 and is a map of the distribution system of Ohio Electric Power Company at Norwalk and is a true copy of the original blueprint, which I made in 1925. So far as I know Exhibit No. 49 represents the distribution system of Ohio Electric Power Company as it is today, but I would not say positively that it does.

On Exhibit No. 50, there are lines of different colors and they represent the wires that have been taken down, and the distribution. I do not know whether they represent additions to the system.

As to Exhibit No. 49, it is a true copy of the original prepared by me in 1925, with the exception of the insertion of the heavy red marks; but Exhibit No. 50 is not a copy of my blueprint of 1925.

On Exhibit No. 48, the poles of the Ohio Electric Power Company are marked with one side colored, shaded. The telephone poles are indicated by a circle and the transformers by a triangle, and the phases of the different lines are indicated as marked on the exhibit, at the lower right-hand corner. The power plant is near a creek, which is at the rear of the plant and it is near Water Street. That was the location of the plant in 1925 and is its present location. In 1927, I superintended the work on these lines in the City of Norwalk, the most of the work being done on East Main Street. We were lowering the poles, cutting off the tops, and setting them deeper into the ground and running a new primary line wire. That was a pole line which Ohio Electric Power Company had acquired from the telephone company and the work involved was changes upon this existing pole line and the addition of some wires to it for Ohio Electric Power Company.

Mr. Webster was then director of public service for the City of Norwalk. While engaged in this job, he came out there.

"Q. You may state what conversation ensued between Mr. Webster and you upon any of these occasions, or any remarks which you heard Mr. Webster make to employees under your direction?

"Mr. Eversman:

Objection to that conversation, if Your Honor please, for the reason that it is entirely irrelevant and immaterial. Anything that Mr. Webster might say certainly would not be binding upon the city.

"The Court:

Do you claim he had the power to bind the city?

"Mr. Boxell:

We claim that Mr. Webster was director of public service, was an official of the city; and this goes to the point of showing the threats by the city to put the Ohio Electric Power Company out of the city, as alleged in the bill; and that will make it relevant and material.

"The Court:

It is not offered on the theory you thought it was, Mr. Eversman; it is offered on a different theory.

"Mr. Eversman:

What theory is it offered on?

"Mr. Boxell:

As I stated, it is offered to prove part of the allegations of our bill, that the city has been threatening to put the Ohio Electric Power Company out of the city by physical force.

"Mr. Eversman:

I have no objection to going into it, except I still insist, if Your Honor please, anything that the director of public service may have said is not binding upon the city.

"The Court:

He said he would connect it up with the city some way.

"Mr. Boxell:

In order to be perfectly frank and fair, I will say I don't know whether what the director of public service said was pursuant to any council ordinance, if that is what is meant; but certainly we are entitled to show what the properly constituted officials of the City of Norwalk did along those lines. They were the persons the Ohio Electric Power Company had to deal with; and it is certainly pertinent to our allegations.

"Mr. Welles:

This city must act by some individual. Here is the individual in direct charge of the streets of the city.

"The Court:

That is true.

"Mr. Welles:

And is given by the ordinance of 1924, if my recollection serves, considerable authority over public utilities of this character. If we cannot show that the city acted by this individual, how can we show the city acted at all?

"The Court:

Was he authorized by some ordinance to do something along this line?

"Mr. Welles:

We do not think he was authorized by any direct ordinance to oust the company by force, but he was placed in supervision of this kind of public utility; he was one of the executive officers; he was the executive officer in charge of the streets. If the city was going

to act by anybody, certainly this is the man the city would act by.

"The Court:

I think I will take the testimony under objection. I do not think it is relevant; it may be later. You may make your record on it.

"Mr. Eversman:

Exception.

"The Court:

I think it is not relevant; but it may afterwards turn out that it is. My notion is that the council is the only body that could make any threats that would amount to anything as to the ouster. Some official walking around would have to get the council's authority to back him, would he not?

"Mr. Welles:

I think it is within the general scope of the authority of the executive official in charge of the streets to eject persons who are wrongfully using the street.

"The Court:

As a matter of fact he never did it.

"Mr. Welles:

He set out ejecting us from the streets—this one or another in the same position.

"The Court:

If he had no authority to enjoin him, he certainly could not do that.

"Mr. Eversman:

That is precisely our objection, Your Honor.

(Question read.) A. He came out at different times, and he was very angry every time he came out.

"Mr. Eversman:

Objection to that and ask that that be stricken.

"The Court:

He is making up his record, Mr. Eversman, for the Circuit Court of Appeals."

"Q. Will you state what, if anything, Mr. Webster said to you on those occasions? A. He told us to get off the streets and stay off the streets; we had no right on there.

"Q. Will you state what Mr. Webster said to any of your employees who were under your direction within your hearing? A. Well he talked to all of us. We were usually all together. He talked so all of us could hear it.

"Q. Do you remember specifically or in substance any of the words which he used? A. His main idea

was to get us off the streets. He said 'Get off and stay off and do not come back again.'

"Q. At the time Mr. Webster gave these directions, these orders to you and your men to get off the streets and stay off, what were you and your men doing? A. Digging holes and setting poles.

"Q. Upon your lines which you said you were working upon? A. Yes, sir."

Yesterday, I observed poles which are used jointly by the city and the Ohio Electric Power Company. There were 70 poles belonging to the city, now being used by the Ohio Electric Power Company by contact of their lines with such poles, and 50 poles belonging to the Ohio Electric Power Company now being used by the city by contact of their lines with such poles. I was all over the system when I made the examination.

CROSS EXAMINATION

By Mr. Craig:

The general office of the Ohio Electric Power Company is at Sidney, Ohio, and its master plant is in that city. The colloquy with Mr. Webster which I have mentioned was had after litigation had commenced between the city and the company.

The poles that are used jointly by the Ohio Electric Power Company and the City of Norwalk with the exception of two cases, are where our lines parallel the city's lines. In order to conduce to safety, it is almost mandatory to use poles jointly where you have parallel lines with sagging wires and, independently of further considerations, the matter of safety necessitates the joint use of poles. The two exceptions are on East Main Street and East Walnut Street, where there is only one set of poles and that one set of poles is used jointly by both systems. Both systems are constructed on every street. There are no streets of any importance in Norwalk but what are supplied with the two rival lines. In some places in Norwalk, it is difficult to maintain one line, on account of the presence of trees.

The Old State Road is the east limit of the city and Main Street, referred to as an east and west street, crosses a street known as Whittlesey Avenue on the north and Benedict Avenue on the south. Main Street is practically lined with houses.

The power plant is an old brick building showing considerable age, one story high with a smoke stack, the dimensions of which I do not know. The Pressing plant

is located on West Street, at the point I have marked P on Exhibit 48.

The line, which I was engaged in building, when I was approached by Mr. Webster, is the line running to The Gallup-Ruffing Company's plant and to Wisconsin Food Products Company's plant. It was a 2200-volt line.

RE-DIRECT EXAMINATION

By Mr. Boxell:

It is perfectly safe in a city like Norwalk to have the city's distribution line on one side of the street and the Ohio Electric Power Company's line on the other if they are properly constructed. The joint use of poles is not made necessary in all instances by safety considerations. There are some lines in the City of Norwalk where there is a joint use of poles with only one set of poles bearing both lines.

Thereupon the plaintiff called as a witness in its behalf

DWIGHT E. TURKLE,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Boxell:

I reside at Bad Axe, Michigan. I have been connected with Ohio Electric Power Company and went to Norwalk in April, 1925, from Ravenna, Ohio, where I had been one year. I was division manager of Ohio Electric Power Company at Norwalk and in charge of the company's business and operations there for three years. I left there in the spring of 1928. I acted ap-

proximately 30 days as manager for Mr. Emanuel. I became acquainted with the system, when I went to Norwalk, and, upon going there, had occasion from time to time to make repairs, replacements and betterments. I made them as I understood the use of the streets to be when I went there.

During the time I was local manager at Norwalk, the distribution system was in good, efficient operating condition and I made use of the generating plant, the boilers of which were kept heated at all times, so that we could get on the line within three minutes with our own generating plant. Any time there was repair work on the transmission line, the power plant was operated in its place. When we were not supplying our customers from the high transmission line, we were able to take care of all demands by the use of the local generating plant.

When I went to Norwalk in May, 1925, the company had approximately 300 customers and up until May, 1928, there was an increase to approximately 475 customers. In the three years I was at Norwalk, we spent approximately $18,000 to $20,000 on the distribution system and we served all private consumers whom we were able to reach. We were not able to reach all people, who desired service from our company, with our then existing line. If we had had permission, we could have extended and supplied further demands and there were further demands.

Plaintiff's Exhibits 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 64, and 66 are all letters on the letterhead of the City of Norwalk addressed to the Ohio Electric Power Company, Norwalk, Ohio, signed either by M. G. Irwin, Superintendent, W. P. Leighton, Director of Public Service, or B. P. Webster, Director of Public Service and Safety, and all were received by the Ohio Electric Power Company, Norwalk, on or about the dates indicated on them.

Plaintiff's Exhibit No. 62 is a copy of a letter to The Local Telephone Company, Norwalk, Ohio, signed The City of Norwalk, M. G. Irwin, Superintendent, and B. P. Webster, Director of Public Service; and I recognize the signatures of those gentlemen.

Plaintiff's Exhibit No. 65 is copy of letter by Ohio Electric Power Company to the Director of Public Service of the City of Norwalk, Ohio, and was written by our attorney, Mr. Pruner, and I signed the original and sent it to the addressee.

Thereupon, Plaintiff's Exhibits 51 to 66, all inclusive, were offered by plaintiff and objected to by Mr. Eversman on the ground that the exhibits are irrelevant and immaterial to the issues in this case; and thereupon a discussion ensued among counsel with the court. Thereupon, over the objection of the defendant, the exhibits were admitted and their relevancy to be passed on later, and an exception taken by defendant.

STATEMENT BY THE COURT:

"Yes, it is understood that all testimony along this line is going in over your objection and that you may make up your record later, if, as and when the case is carried up."

DIRECT EXAMINATION OF DWIGHT E. TURKLE
(continued)

By Mr. Boxell:

Plaintiff's Exhibits 54 and 55, refer to some cables and conduits installed by Ohio Electric Power Company, a 2½-inch iron conduit, and three No. 20 rubber covered wires starting on our poles at the intersection of Seminary and Hester Streets and going underground beneath the basement into our office for its use. That office is now occupied by Ohio Electric Power Company at Norwalk and was being installed as a new office in 1925. These underground cables or wires were installed about the time the Ohio Electric Power Company entered the city.

I learned of the passage by the city council of Norwalk of an ordinance July 1, 1924, regulating the manner in which telephone and electric light wires and poles should be maintained in the street. I learned of that ordinance through the receipt of the letter of July 31st from the City of Norwalk (Plaintiff's Exhibit 54). After receiving the letter, the cable was disconnected from the secondary line and approval was asked of Mr. Leighton, director of public service, to leave it intact, and later the cable was removed.

Plaintiff's Exhibit No. 56 was in response to my application to leave this construction intact.

The second paragraph of Plaintiff's Exhibit No. 58 also refers to this conduit and cable construction.

The conduit is still in place, but the cables and wires were disconnected.

There is no reply to Plaintiff's Exhibit No. 65.

Exhibit No. 64 is the letter referred to in my letter of September 26, 1927, which is Exhibit No. 65. That correspondence referred to the rebuilding of our three-phase primary line from the power plant on Water Street to Main Street, thence east to The New York Central tracks and The Wheeling & Lake Erie tracks. We replaced the poles by cutting them off at the ground line, reset them, and changed the primary conductors to heavier and new copper. This work came under the head of "Maintenance"; not new construction. There was no extension of the lines.

There was no response to our letter, Exhibit No. 65, but the director of public service, Mr. Webster, personally attempted to stop us, after our letter of September 26th was received.

In carrying out the work, in which we were then engaged, we attempted to conform with the specifications of the ordinance of July 1, 1924, and our policy was to abide by the city's ordinances and we did so.

Plaintiff's Exhibit No. 60, a letter to the Power Company, dated November 19, 1925, by Leighton, director of public service, refers to a secondary line on Elm Street from Norwood to Maple Street, and advised us the city would not require us to change any conditions on that line then as it had been put in fairly safe condition.

It was agreed by counsel that the date of the ordinance, referred to in Exhibit 61, as July 1, 1925, is a typographical error and that the writer intended to refer to the ordinance of July 1, 1924.

The directions contained in Plaintiff's Exhibits 61-66, all inclusive, to remove certain sections of lines, were followed and practically all such sections of lines were removed. The service man charged with the work was A. V. Greenfelder. He did the work.

When I went to Norwalk, poles of Ohio Electric Power Company were used for the attachment of lines belonging to the city's distribution system at different places.

Thereupon, Mr. Eversman, for the defendant, stated that there would be no dispute as to the joint use testimony of the witness in relation to 50 of the company's poles and 70 of the city's poles as heretofore testified to by one of plaintiff's witnesses and that such use existed during the time Mr. Turkle was in Norwalk, but that there would be some explanation as to the manner of the use.

The witness, Dwight E. Turkle, further testified:

In 1928, there was a severe sleet storm in Norwalk and the service was in very bad shape all over town, although we took care of our work all night long and never had the service off in the business section, nor was it off the factories on the following morning.

I heard the testimony of Mr. Fauver on the stand a few minutes ago. It was brought to my attention that some arrangement between counsel for the City of Norwalk and counsel for Ohio Electric Power Company had been made to preserve the status quo until the quo warranto suit in the Court of Appeals had been determined, and that the city would not attempt by physical means to interfere with the service of the Power Company, and that the company would not attempt to make extensions of lines. The Ohio Electric Power Company observed that arrangement.

I was manager of the Ohio Electric Power Company in October, 1927, and I recall that in the latter part of 1927 Mr. Greenfelder reported to me that there was some disturbance with reference to the lines of the Ohio Electric Power Company on West Main Street. I went there shortly after it was reported and got in touch with our attorney, Mr. Pruner. I found three transformers on the ground. Several poles had been removed and the 2300-volt wires were practically on the ground at certain points making quite a severe hazard.

I was out there about 7:30 in the morning and saw two employees of the city light department still working. I did not know either of them. I did not observe any vehicle belonging to the city. These lines were down on the south side of West Main Street starting at the church and extending in a westerly direction approximately 1800 to 2000 feet. These lines and transformers belonged to Ohio Electric Power Company. These lines were re-established under my direction by noon of that day.

CROSS EXAMINATION

By Mr. Craig:

When I came to Norwalk in 1925, Mr. Victor Emanuel was operating the Ohio Electric Power Company system of electricity and the transmission line from Elyria served both towns, Norwalk and Oberlin. Elyria is approximately 9 miles east of Oberlin. The high tension line was on the right of way of the old C. S. & C. The electrical current, which supplied Oberlin, came over the high tension line of the Railway Company.

Exhibit No. 48 is correct in a general way as to the location of the electric lines in Norwalk, as of the time I was there.

The poles which were cut down on West Main Street were located from Church Street to Pleasant Street. The majority of the poles had been cut off at the ground and had fallen. The wires were practically on the ground and in most instances were still energized. I would not say that they were on the ground but that in places they were within two feet of the ground. Seven or eight poles had been sawed off. I don't recall seeing Judge Suhr and Mr. Craig there that morning, but I know there was a sudden cessation of sawing.

I do not mean to say that all the poles between Church and Pleasant Streets were disturbed or cut, but 7 or 8 poles were removed. That line on the south side of Main Street west of Whittlesey Avenue carried telephone lines and those lines had been removed from the south side of Main Street between Whittlesey Avenue and Church Street and put in conduits. Some of the poles that were cut sustained the span of wires of the trolley of The Lake Shore Electric Railway Company. Those poles were being used by at least three different parties. I do not know whether the telephone company still had any wires on those poles. I do not know whether they had put in conduits from Church Street west to Pleasant Street. I do not recall receiving a letter from the telephone company addressed to Ohio Electric Power Company requiring it to remove its wires from the telephone company's poles between Church Street and Pleasant Street. I am not certain whether the poles, which were cut down, sustaining the wires of Ohio Electric Power Company, were actually owned by Northern Ohio Telephone Company. Within the space of 1800 to 2000 feet approximately half of those poles were our own poles. So far as the use of the line on the south side of West Main Street was concerned, it was a party line in part, but we maintained our lines on part of the telephone company's lines for 20 years.

There were two new city employees right in front of Don Young's home which is on Main Street just west of Church Street. When I saw them, they were putting a transformer up on the curb, which had been removed from one of the poles. In a general way, I was familiar with the so-called party poles and those poles were used jointly in some instances where a city line ran on one side and the Ohio Electric Power Company's lines ran

alongside of it, and I know there would be instances of crossing from the city line to the opposite side of the street, where there would be a contact with our pole line. I would not say how many there were of such instances, but there probably were 25 or 30 of such contacts. Usually in the case of parallel lines, the city's distribution was on the top of the pole, the upper crossarm, and it depended upon the construction whether the primary or secondary would be beneath it on the same pole. In some instances, the lines were on the same line of poles; in other instances the pole line was on each side of the street. Usually, there was one pole line with both lines on the same pole. That is what we call a joint construction.

Of the $18,000 or $20,000 expended for repairs, replacements and betterments, I could not classify offhand the proportions used for repairs, for replacements and for betterments.

The entire classification is practically what we term maintenance in our accounting system. It all comes under "Maintenance." There is a difference between repairs and replacements. Many times in replacements, such as the construction of East Main Street—there was considerable money put in that line in increasing its capacity. If we removed the wires and exchanged them for heavier, we called it a replacement. The term betterment applied to maintenance and by betterments I mean improving the service. If we took down an old line and replaced it with a new line, it would be denominated a betterment and I so treated the matters, when I said that for these three purposes we had expended $18,000 or $20,000, but I can not say how much was used for each one of those three purposes. They were not all carried as maintenance charges, but a certain amount would be carried to capital investment to improve the capacity of the line. I could not say how much of it was capital. The greater part of the expenditure was for maintenance.

During the time I was at Norwalk, I had control of the property there and, also, the property of the company outside the city in that vicinity. The outside property was from Norwalk east following the transmission line to Kipton, where we had a distribution system for private customers. We, also, had one at Birmingham. When I left there, both the Kipton and Birmingham lines were being maintained. We had a substation at Wakeman off the high tension line which was used to supply electricity for the Railway Company. We had

another station in the rural district and some rural lines outside of Norwalk. The 475 customers were inside the city.

Defendant's Exhibit A is the generating plant in Norwalk and was there during the three years of my activity. Defendant's Exhibit A shows the condition of the plant, when I left the service of the company at Norwalk. It is a fair representation of the plant at that time, but I don't know whether the roof was in that bad shape all of the time I was there.

The testimony in the immediately following paragraph was taken over the objection of the plaintiff that Mr. Turkle's action was not the action of the company, that if it had been it would have no bearing upon any issues in the case because the company could have a perpetual franchise, or any number of them, and at the same time in an effort to avoid a controversy could try to work out a solution by acts of the citizens. An exception was taken.

I am the D. E. Turkle mentioned in Defendant's Exhibit B. I circulated the petition to bring initiative action about. I don't recall just the wording of it. I had something to do with the circulation of the petition at the instance of my superiors, Ohio Electric Power Company. I was instructed by the company to take care of it.

I am now working for a subsidiary of Ohio Electric Power Company. The general company is The National Electric Power Company located at New York. Our company is being operated out of the Chicago office. Mr. Emanuel was connected with that company at one time. Mr. Insull is an officer of the company. The company, which has its headquarters in Chicago, is The Middle West Utilities Company and Samuel Insull is president. The National Electric Power Company is still intact in New York.

I was at Norwalk and had charge of the rebuilding of the line to The Gallup-Ruffing Company. I was not present when Mr. Webster appeared, but was just arriving at the scene, possibly 100 feet away, when Mr. Webster left. I heard no conversation. No force was being used and no overt act of any kind done, but just a little feeling.

"Mr. Craig:

In connection with our cross examination we tender in evidence Exhibits A and B.

"The Court:

It will go in over the objection.

"Mr. Welles:

There is no objection to A—the picture. We ask an exception to the admission of Exhibit B."

RE-DIRECT EXAMINATION

By Mr. Boxell:

When I went to Norwalk, the service on the electric line, which ran along the course of the high tension transmission line from Oberlin into Norwalk, had been abandoned and the railway was no longer in operation, but the transmission line had been in continuous operation; the traction service had been eliminated and a portion of the tracks removed. The high power transmission line was used continuously for the main purpose of bringing current in to serve the Ohio Electric Power Company's distribution system in Norwalk and it incidentally served some smaller stations along the line between Norwalk and Oberlin.

The holes in the roof of the building, shown on Exhibit A, are in the end of the building used for a coal bin. The generators are located in the south part of the building, which has a good roof on it.

Thereupon the plaintiff called as a witness in its behalf

L. B. FAUVER,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Welles:

I am an attorney-at-law and reside at Elyria, Ohio, and have been for a number of years attorney for Ohio Electric Power Company at Norwalk. I have been their general counsel and I was in the quo warranto proceed-

ing associated with Mr. Pruner, of Norwalk, when the rights of that company were tested. After that case had been commenced, I had a conversation with Mr. Craig in his office, at which I believe Mr. Pruner was present, either in the late fall of 1926 or early in 1927. I stated to Mr. Craig that we were hearing continual rumors that certain city officials were proposing to throw our lines off the streets, and we felt concerned about the protection of our property in Norwalk. I said to him that if there was any danger of proceedings of that character on the part of the city, we proposed to take out an injunction as soon as possible. The matter was discussed at length, and I suggested that the whole matter, as far as these lines were concerned, should be held in status quo until the case was finally determined, and Mr. Craig said that the time ought to be limited to the determination of the case in the Court of Appeals. Mr. Pruner joined in the conversation and I remember Mr. Craig said an injunction case would raise substantially the same issues that were raised in the quo warranto case and would occasion a multiplicity of law suits. We finally agreed that our lines would not be disturbed, and that we should not undertake to extend our lines during the time the Court of Appeals had the matter in its jurisdiction. Later on, while taking testimony, and I am not sure where the conversation occurred, there was some letters, but I do not recall their contents—I think from the telephone company—and the matter came up again. I remember we had a letter, in which we thought there was another threat to take down our lines and a similar conversation occurred, but I do not recall who took part in that, except Mr. Craig was there and Mr. Martin probably was there, and Mr. Pruner. I am not sure whether Judge Suhr was there. Substantially the same conversation occurred. I believe it was understood that the status quo of the lines should be maintained and that we should not undertake to extend our lines in any manner whatever, and that the city would not undertake to interfere with the lines. I think that it was Mr. Craig's suggestion that the company should not extend its lines in consideration of the city not disturbing its existing lines for the time being, but I am not sure. Later, in October, 1927, I was informed early in the morning that there was some disturbance with our lines. In the course of an hour—I should say before 9:00 o'clock—I was able to get Mr. Craig on the telephone and said to him that the city, in violation of the agreement which he had made with us, had torn down part of our lines on

West Main Street, I believe he said he had heard of the matter and possibly had been down there or he had seen some of the city officials and had put a stop to the whole situation. He, also, stated positively that this interference with our lines was either against his direct orders or without his knowledge.

CROSS EXAMINATION

By Mr. Craig:

"Q. Mr. Fauver, in order to refresh your recollection, I will ask you if the agreement which you referred to did not take place over in the Common Pleas Courtroom at Norwalk, and if this was not it in substance: We had been taking depositions in the quo warranto case with Mr. Bracey present with Judge Suhr also there, and Mr. E. G. Martin, myself, yourself, Mr. Pruner, and one or more witnesses; and if you did not take a letter out of your pocket and present it to Judge Suhr and say to Judge Suhr 'What are you trying to do with us now?'; and Judge Suhr answered you by saying, 'Why, this is something I do not know anything about; this is a letter from the Telephone Company; and upon the letter being read, it contained in substance this language: To the Ohio Electric Power Company: Having completed our conduits and being under contract with the city to take down our poles, and your wires being thereon—or that in substance—you are now requested to take down your poles.' Then did you not say 'Cannot we make an agreement so far as the city is concerned so that there will be no interference?' And did not Judge Suhr say 'I cannot bind the Telephone Company, but, so far as the city is concerned, we will not cause any disturbance.' And then did you not ask that that agreement be kept in force until the quo warranto case had finally been determined? And did I not say then, 'Until it has been determined in the Court of Appeals.' And then did you not say that; and then did I not say to Judge Suhr, 'While I cannot bind the city by my agreement, I think you better ask them not to extend their lines in the meantime. And then was it not agreed among all parties that that line of conduct should be carried out and preserved? A. Your statement is partly correct and partly wrong.

"Q. In what respect is it wrong? A. It is wrong because it does not incorporate a statement that the arrangement theretofore made, by which the lines were to be held in status quo, should not be carried on in the future; in other words, the statement was clearly made

at the time of this later transaction; and I have forgotten the terms of the letter—if I saw it I would know—the statement was clearly made by myself, referring back to the agreement we had made some weeks or months before with you—we had an agreement that the lines were not to be interfered with.

"Q. Was Mr. E. G. Martin present in my office at that time? A. I don't recall, Mr. Craig, I don't know.

"Q. Do you recall whether Judge Suhr was present? A. I would not recall. You will recall that we had a great many meetings during the time.

"Q. What I stated—did that not substantially take place over in the courtroom? A. There was a letter presented over there; its contents I do not exactly recall.

"The Court:

Is that where you were taking testimony in this quo warranto suit?

"Mr. Craig:

Yes, Your Honor.

"The Witness:

There was undoubtedly conversation about that later.

"Q. Well, if there was any agreement made with me with reference to that, do you know of anything I did not to carry out the agreement? A. Absolutely nothing. I think you were very fair.

"Q. You say you called me about nine o'clock in the morning? A. I called you earlier than that.

"Q. I will ask you if you are not mistaken about that. A. No, sir, I am not.

"Q. And if this did not occur: You called me about two o'clock in the afternoon, from Elyria, saying you had word from Mr. Pruner that someone had been cutting down some poles; and did I not tell you Judge Suhr and I had personally gone out that morning about seven o'clock; and that we had gone out and personally stopped the cutting down of poles pursuant to our agreement; and that I had been trying ever since to get in touch with the superintendent of light, Mr. Irvin; and then did I not further tell you that I had seen the mayor, and that I had seen the director of public service, and both of them disclaimed having any knowledge of it; and that I said to them if they were in any way responsible for it I would get out of the case. Do you remember my telling you that; and did not that conversation occur about two o'clock in the afternoon? A. I would not say about the time.

"Q. Did I not tell you that Mr. Pruner had called

Judge Suhr and me along about seven o'clock, and that we left our respective homes and went out to a place where they claim these poles were being cut down, and that we had stopped them; and that since then, Mr. Pruner had filed a petition in the Common Pleas Court for an injunction? A. Shall I now answer the question?

"Q. Yes, sir, is that not correct? A. No, sir, it is not correct, in this particular: That I feel sure that I talked with you early in the morning. I think that is not important, however. You did not tell me over the 'phone or any other time that the mayor or the service director disclaimed responsibility for what we considered an outrageous proceeding.

"Q. Did I not tell you I had gone to see them and told them I was going to withdraw from the case if I found the city were not living up to their agreement? A. I think you said something about withdrawing from the case.

"Q. If they were not living up to their agreement? A. I think you said to me you would withdraw from the case if the city insisted on going ahead—something of that kind—I don't recall your statement exactly.

"Q. Well, afterwards, you and I had a talk about it? A. I think we joked about it quite a few times.

"Q. And after that did I not tell you that the superintendent of light was trying to justify himself on the ground that these were telephone poles belonging to the Northern Ohio Telephone Company, the one that had written this letter exhibit, in the courtroom? A. No, sir, I don't think you ever told me anything of that kind; I never heard that suggestion in my life.

"Q. You say I did not tell you that? A. Yes, I would, because I think it would have made an impression upon my mind if you had. There was a controversy if you will allow me to make the suggestion—

"Q. If I did not tell you that, what was it the Telephone Company was brought into the case? A. They were not brought into the case.

"The Court:

You mean they were party defendants to this injunction suit?

"Mr. Craig:

Yes.

"The Witness:

Oh, you meant that case.

"Q. Yes. A. They claimed some poles on the east side of town that the Ohio Electric Power Company, I

think, claimed to own. I never knew that controversy extended to poles on West Main Street; never heard it did.

"Q. Do you know where these poles were cut down? A. They were on the south side of West Main Street. I think there perhaps were seven or eight or ten poles.

"Q. Do you know what became of the letter from the Telephone Company that you had in the court room? A. I do not. I may have it in my files. I don't know.

"Mr. Craig:

That is all.

"Mr. Welles:

That is all."

Thereupon the plaintiff called as a witness in its behalf

W. R. PRUNER,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Welles:

I reside at Norwalk and for a number of years have been practicing law there. I have been attorney for the Ohio Electric Power Company four or five years. I have knowledge of the incidents testified to here regarding the cutting down of poles, on which were wires of the Ohio Electric Power Company, by city employees in October, 1927. I live on West Main Street and when I came down town that morning I noticed some poles had been cut and some wires let down between Church Street and Pleasant Street. Eight or ten poles were cut off, the wires were hanging low toward the ground. It was about 8 o'clock and I saw some men—city employees—

along the line. I do not recall whether they were working at that time. It seems to me that there was a city truck there too. I do not recall that I saw any city officials.

I remember calling on C. Ray Craig at his office in company with Earl Boxell January 3, 1930. There was some conversation on the subject of the injunction granted by the state court. Mr. Boxell and I went over to Mr. Craig's office and Mr. Boxell was introduced to Mr. Craig. Mr. Boxell proceeded to state that he was representing the Equitable Trust Company; that on behalf of that company an action had been started in this court; that while an injunction proceeding was then pending in the Common Pleas Court of Huron County it would not be effective, in view of the fact that the quo warranto case had been decided against the Ohio Electric Power Company by the Supreme Court of Ohio, and Mr. Boxell asked Mr. Craig if he would agree to continue the arrangements, which we had made, that the status quo of the property would continue during the litigation which was then pending in this court. Mr. Craig said the city had granted all the favors that it would grant, and that he proposed to take action to get the Ohio Electric Power Company off the streets of the city. That was the substance of the conversation.

I think Mr. Craig put it that "we" would take action to put "you off the streets of the city, put the company off the streets of the city." Mr. Craig declined to enter into any arrangements whereby the state court's injunction was to remain in effect without contest pending the outcome of this suit in the United States court.

CROSS EXAMINATION

By Mr. Craig:

"Q. Mr. Pruner, do you recall any other part of the conversation? Was there any other conversation occurred there than you have related? A. Yes, sir, there was some further talk there.

"Q. Do you recall it? A. Yes, sir, some of it. Maybe I do not recall all of it.

"Q. Let us see how nearly you and I can get together. Mr. Boxell came into the office with you? A. Yes, sir.

"Q. Do you remember what was first said? A. I introduced you to him.

"Q. You introduced him as Mr. Boxwell, did you not? A. I did.

"Q. He corrected you and told you how his name was spelled? A. Yes, sir.

"Q. And then he told me he was from the firm of Tracy, Chapman & Welles of Toledo, did he not? A. Yes, sir.

"Q. And that that day he had filed a bill of complaint in the United States District Court for the Northern District of Ohio against the City of Norwalk on behalf of the Equitable Trust Company of New York? A. That was stated at that time. I think he stated it.

"Q. Do you remember what next occurred, what next was said? A. Well, I don't know what next was said; but I remember—

"Q. Did I not ask him then what the Equitable Trust Company had to do with it? A. You asked him that in the course of the talk.

"Q. Did he not then say that the Equitable Trust Company was the assignee of the Seaboard National Bank of New York? A. I don't recall that. I thought in that connection he stated that his client was trustee for the bondholders of the property that was involved in Norwalk.

"Q. And then did I not call his attention to the fact that the mortgage that was of record did not appear to have been assigned to anyone, but stood in the name of the Seaboard National Bank of New York as trustee? A. I don't recall that.

"Q. Then did he not tell me that the Seaboard National Bank had been merged with the Equitable Trust Company? A. That statement may have been made.

"Q. And then did he not say that he had called to see whether or not he could get a stipulation whereby the City of Norwalk would agree to let the injunction in the case that had been commenced by the Ohio Electric Power Company against the City of Norwalk and the Northern Ohio Telephone Company and others stand until the litigation pending in this court was determined? A. I think that is about the substance of his request.

"Q. And then did I not—do you remember what I said next, and what was next said? A. You said that, I think about that time, that you would not; the Ohio Electric Power Company had all the favors that they would get and you would not grant any more favors.

"Q. Before that, did I not say I was not an attorney in the case pending in the state court, that is, the case of the Ohio Electric Power Company against the

City of Norwalk and the Northern Ohio Telephone Company, and that, therefore, I had no authority to enter into any stipulations? A. I do not remember it that way, Mr. Craig.

"Q. And did I not expressly say that Mr. Bracey had just come in as the new city solicitor, having succeeded Judge Suhr; and that I would not want to take up the matter of any stipulations without the presence of Mr. Bracey? Did I not say that in substance? A. I don't recall just that part about Mr. Bracey. But you did say in the course of the talk, as I understood you, that you were not engaged as counsel in this suit that Mr. Boxell was talking to you about. I do not recall you said anything about the old injunction suit that was then pending, because he came to you, of course, as an attorney representing the city; that is the reason he was there.

Q. Did I not tell him I did not represent the city in that case, and that Judge Suhr, having just gone out of office the first of the year, and Mr. Bracey having succeeded him, I had no authority to enter into any stipulations without taking the matter up with Mr. Bracey; and then did I not say that I would also have to see Mr. Martin who had been of counsel in the quo warranto case; and did not Mr. Boxell say that you had just been to Mr. Martin's office and Mr. Martin was not there? A. That might have been said.

"Q. And then did I not inquire of him whether or not any preliminary injunction had been granted by this court, that is, the federal court? A. I think you did.

"Q. And did he not say that no preliminary injunction had been granted, but he expected to apply for one? A. Yes, sir, that was stated in the talk.

"Q. And then did I not ask him on what ground he expected to apply? A. I don't remember.

"Q. And did he not answer that by saying, 'Because you fellows violated your agreement you had with the Ohio Electric Company'? A. I don't think that was stated, Mr. Craig.

Q. Are you sure of that—and then did I not say to you 'You mean to imply that I violated my agreement with the city'? and he said 'No, not exactly you, but there was a violation of the agreement.' And then do you not remember I said that you knew I had gone out with Judge Suhr, or had been advised I had gone out with Judge Suhr and stopped them cutting down the poles which it subsequently developed belonged to the Telephone Company? A. There was nothing in the con-

versation, Mr. Craig, that inferred that you had violated your agreement. I will say that positively.

"Q. If that is my recollection, then, one or the other of us is mistaken? A. Yes, sir, I think one of us must be wrong.

"Q. Do you not remember about the Telephone Company being mentioned? A. I don't think it was in that talk at all, Mr. Craig.

"Q. Did I not say you had made the Telephone Company a party defendant in the case that was pending in the state court? A. We got into nothing of that kind, because when Mr. Boxell stated what he was trying to do—that he wanted to get an agreement instead of securing a temporary injunction, and hold the matter in status quo—that was the term that was used from the start to the end, as far as I know—you said quite emphatically that no more favors would be given to the Ohio Electric Power Company.

"Q. Did I not say I had been tired of granting favors because I thought I had been imposed upon by someone connected with the Ohio Electric Company? A. No, sir.

"Q. Did you say, 'Mr. Craig, I don't have anything to do with this litigation now pending in Toledo'? And did I not say, 'No, Mr. Pruner, I don't think you had; and neither do I think Lee Fauver was connected with it'? A. No, that was not the way it came about at all.

"Q. Did I not say, 'I am not making any implication against you'? A. You said that.

"Q. Then did I not say that King Fauver had called me up shortly after the Supreme Court of Ohio had affirmed the judgment in the case that had been taken on error from the Circuit Court and told me that the Ohio Electric Power Company intended to go to the Supreme Court of the United States direct from the Supreme Court of Ohio; and that we had been trying to be decent and had waited when we might have asked to have the mandate enforced; and that the time would expire tomorrow night for them to go to the Supreme Court of the United States. Do you not remember that? A. Not that. I think the question of the expiration of the time within which to effect the appeal was discussed; but that is the first time I heard of that conversation between you and Mr. Fauver.

"Q. Did I not tell that to him? A. No, sir.

"Q. Or to you? A. No, sir. I don't think so.

"Q. Would you swear positively it was not mentioned? A. Yes, sir, I will say it was not mentioned.

"Q. By me in that conversation? A. Yes, sir.

"Q. Do you remember what next was said? A. I have not got the sequence in my mind. I have not spent much time on it.

"Q. Did I not tell him I could not agree to anything because— Did I not ask him if he had a copy of the bill of complaint with him; and he said he did not have, but a copy would be mailed here? A. Yes, sir, I think you asked for a copy or that one be sent to you.

"Q. Did I not tell him I did not know—I would have to call Mr. Bracey's attention to it; also some members of the council; that I did not know whether I would be employed to represent the city in this case? A. Yes, sir, I think you said that.

"Q. And that I would want time; and he asked me when I could give it my time? A. I don't know that.

"Q. Did I not say, 'I have to go to Cleveland tomorrow'? Do you remember what day of the week this was? A. The third day of January—no—I cannot recall what day of the week it was.

"Q. It was Friday night, was it not? A. I don't remember.

"Q. Did I not tell him I would have to be away all the next day? A. I don't remember that.

"Q. And did I not tell him I would have to be away from Norwalk all the next week? A. I don't know. You might have said that.

"Q. And did you not say, 'Mr. Craig has to go to Columbus, I know, Monday, because he is a member of the board of examiners, to examine applicants for admission to the bar before the Supreme Court'? A. That might have been said.

"Q. Do you not remember that that was discussed? A. I think it was.

"Q. And then do you not remember I said that I could not give the matter any of my attention until the week after the week following; but before leaving I would try to see the city solicitor and tell him, and tell Mr. Bracey; and that whether I would be employed to represent the city or not in the case in the federal court, I did not know? A. Well I know there was talk that you did not know whether you would be employed in this particular case. You could not say at that time. I don't know what the language was.

"Q. And then did I not say that the city had been trying to be decent: and that we had withheld trying to enforce the mandate sent down by the Supreme Court to give Fauver & Fauver an opportunity to go to the

United States Supreme Court; and that Mr. King Fauver had telephoned me and asked me whether I wanted a supersedeas bond filed or not to hold the mandate in abeyance? A. I will not say that was not said.

"Q. And then I made the remark, did I not, that it looked now as if we had been imposed upon because the Ohio Electric Power Company had evidently procured the Equitable Trust Company to commence suit to try this whole question over again in the federal court? A. I don't think you put it quite that way.

"Q. Did I not put it that way substantially? A. This is what you said: You said that the Equitable Trust Company was the plaintiff, but inferentially you seemed to give the impression that it was the Ohio Electric Power Company; and you said a number of other things—something about the attorneys that brought the suit—if you recollect that.

"Q. Did you not say you had nothing to do with it? A. Yes, sir.

"Q. And did I not say, 'No, Mr. Pruner, I don't think you have'? A. Yes, you said that. In that connection you said you thought Tracy, Chapman & Welles was a pretty good firm, but you did not think they would start a suit like this.

"Q. Did I not say I had a high opinion of them? A. Yes, you did, notwithstanding.

"Q. And the fact of the matter was I did say I could not grant the favor because I did not have authority to grant it, and I would have to talk to the other people? A. You emphatically stated you would not grant any further favors.

"Q. You knew I was not attorney for the city in the case pending in the Common Pleas Court, did you not? A. No, sir, I didn't know whether you were or not; I don't know who was attorney in that case. Mr. Craig, I think you filed an answer, did you not, in behalf of the city officials there? An answer was filed on behalf of the city by the city solicitor. I don't see his name on that.

"The Court:

Was Judge Suhr city solicitor the day you went down and tried to stop this pole removal?

"Mr. Craig:

Yes, Your Honor.

"The Court:

At that time he was city solicitor?

"The Witness:

Yes, sir.

"Q. You prepared the petition in this case—the Ohio Electric Power Company? A. Yes, sir.

"Mr. Welles:

It is already in, a copy of it.

"Mr. Craig:

Exhibit No. 47, as I understand, Mr. Pruner, is a certified copy from the clerk. You prepared the petition?

"The Witness:

Yes, sir, under great stress. That looks like a copy of the petition.

"Q. And of course you examined the answer after the petition was filed, did you not? A. Yes, sir, I did.

"Q. In order to throw some more light upon this controversy, do you remember calling me the morning you observed those poles down, or heard they were down—calling me by telephone? A. Yes, sir.

"Q. That was about seven o'clock in the morning, before you came to the office, was it not—after you received notice from someone connected with the Ohio Electric Power Company that poles were being cut down on West Main Street? A. I don't believe it was quite that early.

"Q. It was before you came down town you telephoned me from your residence, and also telephoned Judge Suhr. A. I thought the first knowledge I had of that was when I walked down the street. I don't think I knew anything about it until I came down the street.

"Q. You telephoned Judge Suhr and you telephoned me, did you not? A. No, sir, I don't believe I telephoned Judge Suhr. I phoned you, though.

"Q. What did I say? A. You were very much incensed that the action had been taken by the city officials.

"Q. Did I say what I would do? A. I thought you said you had been—maybe you said you would go out—I was thinking my talk was after you had been out—I am sure it was after you had been out. You said that you had gone out there and called them down for interfering with that line of poles and wires; and that it was in violation of your agreement with us; and that if they proceeded in that, you would have to withdraw from the case. That is the substance of what you told me.

"Q. Then did I not tell you I had to go out of town, and I could not investigate it until after I came back to find out what was behind it; and about noon did I not tell you I had been to see the heads of the departments, that is, the director of public service; and that he said

he knew nothing about it; and that he assured me there would not be any repetition; and you said that, as a matter of safety, you had gotten an injunction against the city and against the Northern Ohio Telephone Company? A. We did have a talk. I don't remember what you said about the city officials. I just do not recall that part of it.

"Do you remember a further remark I made that I thought you had not made the right man party defendant? A. No, sir, I don't recall that at all; I don't believe that was said.

"Mr. Craig:

That is all.

"Mr. Welles:

That is all, thank you, Mr. Pruner.

Thereupon the plaintiff called as a witness in its behalf

EARL F. BOXELL,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Welles:

I reside in Toledo and am engaged in the practice of the law and have been for some years, and am a member of the firm of Tracy, Chapman & Welles, solicitors for the plaintiff in this case. I remember calling on G. Ray Craig at his office in Norwalk on or about January 3rd in company with Mr. Pruner. I was introduced to Mr. Craig, and told him I was with Tracy, Chapman & Welles; that I had come to him as one of the attorneys for Equitable Trust Company of New York; January 3, 1930, we had filed a bill of complaint in this court to enjoin the City of Norwalk on behalf of Equitable Trust

Company from interfering with the operation of the lines of the Ohio Electric Power Company in the streets of Norwalk; that the Equitable Trust Company was trustee under a mortgage given by Ohio Electric Power Company; that I knew that Mr. Craig was attorney for the City of Norwalk in the quo warranto suit; that inasmuch as we were asking for an injunction in this case and there was an injunction in effect in the Court of Common Pleas of Huron County, in favor of the wer Company, and against the city, restraining interference with the lines and operation of the company, it seemed to us that it would be advisable for an agreement to be made between counsel for the city or its proper representatives, and counsel representing Equitable Trust Company, whereby the injunction in the Common Pleas Court might be permitted to remain in effect, pending a final determination of the issues in this court; that we would be glad to have an early hearing of this case; that we could eliminate the necessity of having two hearings and that no application had been made as yet for a preliminary injunction and, that that was the reason I was down to see him.

Mr. Craig indicated by his manner that he was considerably annoyed at the request and stated that there would not be any further favors granted to the Ohio Electric Power Company as far as he was concerned, and I think he may have said that "naturally, he was not specifically retained in this case here in the Federal Court," it having just been started.

Mr. Craig said, with reference to the suit in the Federal Court, that as far as he was concerned there would not be any favors granted to the Ohio Electric Power Company and that "we" would put the Power Company out as quickly as possible from the City of Norwalk. My request was definitely declined. I think I did say to Mr. Craig that we had called at Mr. Martin's office with the idea of seeing Mr. Martin and Mr. Craig together. Mr. Martin was out. I told Mr. Craig I regarded him as chief counsel for the city in the quo warranto case and, therefore, came to him.

CROSS EXAMINATION

By Mr. Eversman:

I think that probably Mr. Craig told me he had not been employed by the city to represent it in this suit and that when I told him about commencing the suit he said it was his first knowledge of it. He said that if he should

be employed as counsel in this case, he would not enter into any stipulation. When I went to Norwalk January 3, 1930, I do not think I knew who the city solicitor was. Mr. Martin was not. I called with Mr. Pruner on Mr. E. G. Martin, but we did not find him in the office. I do not recall that I made any inquiry to learn who the city solicitor of Norwalk was.

Thereupon the plaintiff called as a witness in its behalf

WILLIAM INSULL,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Welles:

I reside at New York and am engaged in the operation of public utilities. I graduated at Cornell University in 1916 with the degree of Mechanical Engineer and a certificate of having specialized in electrical engineering. Since 1916, I have been in public utility work, except for 18 months when I was in the Signal Corps of the army. I am assistant to the president of The Electric Management and Engineering Corporation. That corporation is a subsidiary of National Electric Power Company, and Ohio Electric Power Company is a subsidiary of The National Electric Power Company.

Since 1916, I have had occasion in my business career to evaluate electrical properties, generating plants and distribution systems. Last Friday, November 7th, I inspected the plant of Ohio Electric Power Company at Norwalk. I have undertaken to determine the present sound value of the plant and distribution system and of the high tension line supplying the City of Norwalk as of this time. I made a personal inspection of the prop-

erty at Norwalk and the transmission line and estimated the present physical value in percentage of the original value and, also, made an itemized list of the major items making up the system, and applying ordinary present-day costs of unit construction to the items to find the present reproduction value new, and then applying these percentages to the present depreciated value of the property, as I estimated it. I started with the sub-station at Oberlin, running west to Norwalk, and the sub-station at Norwalk located at the power house. There are about 25 miles of transmission line.

"Q. Taking the transmission line and the generating plant at Norwalk, the equipment in the plant and distribution system, into consideration, what value did you arrive at as a total?

Mr. Eversman:

Objection. It is irrelevant and immaterial.

The Court:

The only thing he has got to prove is the amount in controversy.

Mr. Welles:

Yes, Your Honor.

The Court:

Else the court has no jurisdiction.

Mr. Eversman:

We will concede that the amount involved here is in excess of $3,000.00.

The Court:

I do not think you can do that for the purpose of jurisdiction; at least there is some doubt about it.

Mr. Welles:

I don't think you can make an agreement to confer jurisdiction on this court.

The Court:

There would be some doubt about it if you did.

Mr. Eversman:

If it is for that purpose, and that purpose only, if Your Honor please, there is other evidence in this case on that subject. As a matter of fact it seems to me there is enough evidence in the case from which the court could find the amount involved is in excess of $3,000. Moreover, if Your Honor please, there is a stipulation in respect to the tax valuation of this property.

The Court:

I think you will have to take the testimony, to be safe.

Mr. Welles:

It will not be very long.

The Court:

There are just a few questions.

Mr. Eversman:

Exception.

The Witness:

In my opinion the value of the transmission line and property in the City of Norwalk is $108,324.00.

Q. How much of that value in your opinion represents the value of the transmission line? A. $48,750.00."

The remaining part, approximately $60,000, represents, in my opinion, the sound present value in use of the powerhouse, land, powerhouse equipment and distribution system. I include no franchise value.

"Q. Assuming, Mr. Insull, that it should be necessary at this time wholly to discontinue the use of the powerhouse, the equipment and of the distribution, and to discontinue the use of the powerhouse as a generating plant for use by this company, and not now for the purpose of this question considering the high tension line, what, in your opinion would be the value, fair realizable value upon the property I have mentioned?

Mr. Eversman:

Objection; it is wholly irrelevant and immaterial.

The Court:

He is going by that to get at what the plaintiff in this case would lose if this franchise were taken away from it and the right to operate taken away.

Mr. Welles:

Yes, Your Honor.

The Court:

That establishes what the amount in controversy is in the plaintiff's point of view.

Mr. Eversman:

Exception.

The Witness:

From my experience in the past, it would cost some money to remove; in other words, the junk value would not be sufficient to pay the cost of removing the material from the present location.

The Court:

It practically would wipe out the value of the powerhouse, is that true?

The Witness:

And then it would cost some.

Mr. Welles:

Your Honor's question—wipe out the value of the powerhouse—how about the distribution system?

The Witness:

The same thing there."

The high tension transmission line supplies two sub-stations between Oberlin and Norwalk and these supply little communities or rural lines. In my opinion, the service rendered to the two small sub-stations is not sufficient to carry the cost of maintenance of the line for that purpose only, assuming that all use of the line in Norwalk were discontinued. If this high tension line from Oberlin to Norwalk in its present use and value, were no longer permitted to be used to serve the plant and distribution system of Ohio Electric Power Company in Norwalk, it would cost more to maintain the line than what the business along the line warrants. If the line were discontinued and removed, on account of discontinuance in active service the cost of recovery would more than counteract what junk value you could get out of it. If Ohio Electric Power Company is compelled to wholly cease its operations in Norwalk, there will be substantially a complete loss of $108,000.00, which I attribute to the entire system, including the transmission line.

CROSS EXAMINATION

By Mr. Craig:

I am a nephew of Samuel Insull, who is one of the heads of Middle West Utilities, one of the executive officers. Electric Management & Engineering Company is related in a business way to Ohio Electric Power Company and these companies are related to Middle West Public Utilities Company. They are subsidiaries.

My estimate of the value of the physical property at $108,324.00 includes the transmission line, sub-station at Norwalk, powerhouse at Norwalk, primary and secondary distribution system, meters and transformers. In inspecting the line, I did not go east of Oberlin on this trip. I did not consider the value of any property east of Oberlin, nor any part of the electrical distribution system in Oberlin. The next sub-station is at Birmingham, about 12 miles from Oberlin, and the other sub-station is located nearer to Norwalk, at Stop No. 37 on the old railway that ran along the transmission line.

I have not heretofore been out to estimate the value of this property. I had been out on an inspection trip of the property. I had nothing to do with the estimation of the value of the entire property west of Elyria, when Victor Emanuel transferred it to Ohio Electric Power

Company. I did not have anything to do with Exhibit No. 19, and am not familiar with those figures. I was not with my present company, when Emanuel transferred the property to Ohio Electric Power Company.

In estimating the value of property for reports to public utilities commissions and to tax commissions, etc., I am called upon in a way to make an estimate of the values. I am somewhat acquainted with the financial affairs and the various properties of Ohio Electric Power Company and for a short time have exercised more or less supervision over the estimating of values of the respective properties that constitute a part of that system. I know all the different properties belonging to Ohio Electric Power Company, located in the City of Norwalk, and have more or less familiarity with the different units that constitute the Ohio property of that company and the property which they have in different counties in Ohio.

I have approximate knowledge of the total valuation of the properties of Ohio Electric Power Company in the State of Ohio. I was acquainted with Mr. J. A. Ward, of Sidney, Ohio. J. A. Ward is not now vice-president of Ohio Electric Power Company, but I think C. E. Bramble was assistant secretary March 27th.

I know approximately where the Village of Wakeman is. Ohio Electric Power Company had been supplying electrical power off this high tension transmission line formerly used by the Railroad Company for the Village of Wakeman.

I do not have any knowledge about whether in a report made by Ohio Electric Power Company to the Tax Commission of Ohio for the year ending January 1, 1930, all the property of Ohio Electric Power Company in Huron County was returned at a valuation of $19,632.99. I do not have any knowledge about that. I have nothing to do with the preparation of tax reports. Mr. Bramble I suppose has something to do with the preparation of tax reports. He lives at Sidney. I made a written inventory of the major items of property included in my valuation of $108,000.00. I have the report with me. I will be willing to have it inspected, if it is all right with counsel.

When I made the inspection of the Ohio Electric Power Company at Norwalk, I was there about 6½ hours. While there, I drove over the transmission line and drove over the system. When I say drove over the transmission line, I mean that I drove along the road from Norwalk to Oberlin taking the cross-roads, so as to

view the transmission line from each cross-road, and got out and looked at it at the different cross-roads. That was all I did, so far as the transmission line was concerned. At Norwalk, I went over the primary lines and secondary lines, driving up and down the streets and went to the generating plant and inside the same. I looked the plant over; took the name-plate readings of the different places of equipment, giving the sizes, etc. That was all I did, with reference to inspecting the plant. That took 6½ hours.

I did not make my calculations at Norwalk, but worked on Saturday, Sunday and Monday.

The discrepancy between paragraph 1 and para-2, on page 3 of my description (Exhibit D) is due to the fact that ordinarily, at the present time, we use copper wire and not aluminum wire. I understand that there is a No. 2 aluminum cable in that transmission line, which I did not caliper, but I inquired of some employee of the company as to the size. I can tell approximately the size of wire. In making my estimate on the reproduction cost new of this plant, I took the present day price of copper wire. I cannot say what the price of No. 2 copper wire is as compared with No. 2 aluminum. I know that the cost of aluminum is somewhat less than copper. I would not say one-third less per pound. The transmission line, as I understand it, consists of poles, wires, insulators and cross-arms. The price that I have allowed for No. 2 copper wire per pound, in arriving at a price for the transmission line, is per mile price, as supplied me by the engineering department, based on average prices of today. I placed a price per mile on the entire transmission line as I know that price is approximately the cost, but right now I could not break that price down to its elements. It is an average price. From experience that is what the cost is.

The poles in the transmission line are 35-foot poles. I do not know what price is used per pole. I do not know the kind of wood that is in these poles. There are different types of poles along the line. I did not make an investigation to determine what kind of poles there were on this transmission line, either as the kind of wood or the diameter at the top. They were average poles, such as we use right along. The cost of labor in setting these poles is in the figures. If I had broken it down, I would have arrived at approximately the same prices. The cost of labor in setting these poles would be around $7 to $8. The replacement price of new poles, 35 feet long, is $16 per pole, probably a 7-inch top.

I am not prepared to state what would be the cost of labor in installing wires and cross-arms. That would be a figure I would have to have, if I were to break down this figure of $3,000. I was figuring on wooden arms, in my $3,000 basis. My estimate embraces Keystone metal arms for 23 miles. I can not give you the price of Keystone metal arms. My estimate is on the cost per mile basis. In my statement, I assumed that Keystone metal arms were used approximately a distance of 23 miles on these transmission lines, and I estimated 2 miles with wooden arms. I don't know the cost of wooden arms per mile.

In making my estimate, I noted porcelain insulators, 35,000 volt, but I did not estimate the number of these insulators. The price is fixed on the number of insulators you would have. I did not fix any price per insulator, but I know there are more insulators in that particular transmission line than one would have with a 300-foot span. The present span is 125 feet average. I used a 1930 or 1929 price, an average price between the two years. I could not say whether the price varied much during 1930, but I used this for both years, based on the $3,000 per mile that we had been using for 1929 and 1930. In buying and selling plants, we estimate on that basis.

In my Exhibit D on page 3, by "substation" I mean the transformers, regulators, lightning arresters, fuses and disconnect switches partly in the building and partly on the outside. By building, I mean the generator plant, the large building shown in Exhibit A. The small building I understand was a part of a gas plant.

I do not know when the three 100-K. V. A. transformers were installed, but I imagine when this line was changed from 25 to 60 cycles, but I don't know the exact date. I judge the equipment is around 7 or 8 years of age. The transformers I priced at $2,298.00. I could not say how old the lightning arresters are, nor could I tell from appearance. The voltage regulators appear to be comparatively new, possibly 3 years.

The large building shown on Exhibit A is in actual use and the entire building is used. I went inside of that building. In estimating the cost of reproduction of that building at 20c per cubic foot, I will say it is the price I have received lately as the price of similar buildings. I understood the "tandem compound steam engine John T. Noyes Mfg. Co." was put in when the plant was built in 1895. We are still using engines of that type. I don't know as you could duplicate that

particular engine, but we have engines of the same type. I did not place any individual value on it and can not say what its fair reproduction cost would be. The belt driven generator manufactured by The Allis Chalmers Mfg. Company, I assumed was purchased in 1895. I placed no individual price on it, but put it under the total price. It is not exactly an obsolete type of generator. I expect you could get one like it from The Allis Chalmers Company. I can not give you any individual price.

There was installed a belt-driven exciter, Westinghouse Electric & Manufacturing Company, of a certain type, the cost of which I can not give you. It was installed at the same time, approximately, in 1895. It is not an obsolete type of exciter. I can not give you the reproduction cost of the 150 horsepower water tube Sterling boiler. I understand that was installed when the other equipment was. I think the sheet iron breeching is a replacement, but can not say when it was replaced and can not give you the cost of it, new. I expect the switchboard panels, referred to on page 4, were installed at the same time, but I can not give the individual cost.

The distribution system refers to the wiring from the station, this brick building, along the streets of Norwalk; and then from the streets to the individual consumers, including transformers and meters and poles. In my estimate, I have assumed that there are 8.45 miles of primary distribution. The primary distribution is the wire line that takes the power from the generating plant to the transformer, and that mileage is approximately 8.45. I did not get that myself, but got it from the Sidney office. The secondary wire is the wire strung from the transformer along the pole line to the last pole before entering the house. I have estimated the length of the secondary distribution at 8.10 miles. That was taken off the map at Sidney. By consolidating the primary and secondary lines, I arrived at the total wire mileage. Some of the distance will have both primary and secondary wires. The 13.11 can not be ascertained, manifestly, by adding 8.45 and 8.10, but has to be scaled off the map. I can not say what the total mileage of the primary and secondary lines and the line going from the pole to the individual consumer is, offhand. There is no way of computing it from any figure I have here. My estimate of the cost of distribution system is arrived at by multiplying an average distribution by the number of customers in Norwalk, and that estimate is based

upon a three-wire single-phase service. I do not know how many of those 453 customers have a three-wire single-phase service. I do not know it to be a fact that there are but 20 customers who have a three-wire single-phase service, and that only 10 customers have a three-wire three-phase service. If that is true, then all the balance of the customers would have a two-wire service, and if that were true, it would affect my calculation by a very small percentage, because my calculation is based upon three-wire single-phase service. If we had 423 customers with two-wire single-phase service it would affect my figures by a very small percentage. It would not affect it enough, so as to make a difference between $66.71 per customer and $50.00 per customer.

On the basis of my calculation, I took the footage of wire for each customer as an average. It would be the six lengths of 125 feet, that is, 750 feet plus, according to the calculations there, three wires of about 125 feet, and the service wires from the house to the pole.

The property, which is covered by my Exhibit D, has no scrap value outside of the land, which I estimate at $1500. The cost of taking the equipment down would be as great as the scrap value of it and in the ordinary sense that property has no scrap value. Whether, if I were to build a new distribution system at Norwalk I would buy a different type of equipment than that now in the brick building, would depend upon the size of the load and upon how far away I would be from a larger source of supply, and, if I had a small, isolated plant away from a larger generating plant, the probability is I would put in a steam unit very much on the order of this one.

In my estimate of distribution, which appears on page 1 of my exhibit, in arriving at a figure of $30,154.00, I did not assume that all the electric wires were located upon poles of the Ohio Electric, and I do not have any exact number of poles. I did not figure it by poles, but there are more poles in the City of Norwalk owned by the company than one would derive by taking one span each for 453 customers. On Exhibit 49, the Ohio Electric Company has a wire line along Main Street. There are poles along there, and it was my understanding that those poles were the poles of the Ohio Electric Company and I assume that to be the fact, but my estimate allows for a certain percentage of poles used by the Ohio Electric which it does not own. It is small in comparison with the total number of poles owned by the company. In my estimate, I assume that the Ohio Electric Com-

pany owned one pole per customer and that the company owned 453 poles, and that they were in use on the day when I made my inspection.

RE-DIRECT EXAMINATION

By Mr. Welles:

The method of arriving at valuation of property of this character which I have used is in common and ordinary use. Experience has shown me that by this method which I used I can arrive at as fair and accurate an estimate of the value of property as though I broke it down to each separate unit and applied unit prices.

RE-CROSS EXAMINATION

By Mr. Eversman:

I know approximately the method of valuation used by Public Utilities Commission of Ohio and they usually count each item and by getting the price in their estimate they get the price on each component unit. This is a method I use when buying plants. It gives a very close approximation and I think the price is conservative.

Thereupon the plaintiff called as a witness in its behalf

CLINTON HEATH,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Boxell:

I am employed by Ohio Electric Power Company at Norwalk as a lineman and have been so employed about three years last past. During part of October, 1927, I was employed by the City of Norwalk as a lineman under

M. G. Irvin, who is superintendent of electricity and water. Late in October, 1927, I remember of being engaged in taking down some poles and lines on West Main Street in Norwalk. Mr. Irvin came out to where the boys were working and told us to report to the sub-station at 4:00 o'clock the following morning. Our usual time for reporting was 7:00. Other employees and I reported to Mr. Irvin at 4:00 o'clock the next morning, when it was dark and we went out West Main Street. There were probably six or seven men who so reported. I rode with Mr. Irvin, who was superintendent of the lines for the City of Norwalk. When we assembled that morning, Mr. Irvin said, "We are going to take down some Ohio Electric Power poles." Some of the men went out in a city truck. We started to work from west to east. Another lineman and I went ahead and freed the poles and crossarms and some of the other men followed and took the poles down. Six or seven poles, possibly eight, were taken down. I should say that this work covered four ordinary city blocks. The poles were spaced I imagine about 150 feet apart. We did not take every pole down. I remember some transformers were taken down. Some poles were skipped. After taking down the poles, the lines were left in a rather unsafe shape, although we tried to keep the wires up in the clear, so no one would run into them. I left the work at 8:00 o'clock that morning and went somewhere else and did not return. The boys were working when I left the job. Mr. Irvin directed the job. I do not know how long Mr. Irvin remained on the job. I did not see him when I left there. He was there nearly to the time when I left. Mr. Irvin directed me as to which of the poles should be removed.

Shortly after that, I left the employ of the city and then became employed by Ohio Electric Power Company. The most of the work in replacing poles had been done when I went to work for Ohio Electric Power Company. I helped to do a little straightening.

The lines, which were taken down, carried 2200 volts and were known as primary lines.

No cross examination.

Thereupon the plaintiff called as a witness in its behalf

ALFRED V. GREENFELDER,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Boxell:

I reside at Norwalk, Ohio, and am and have been, since Ohio Electric Power Company took over the property at Norwalk, its service man. Prior to that time I had been employed by Cleveland & Southern for a year or a year and a half at Norwalk. I was there when Mr. Emanuel held title to the property.

In October, 1927, I lived at Monroeville, west of Norwalk. In the morning in late October, 1927, as I was going to work about a quarter to seven I noticed several men working as I drove by. I did not stop but noticed they were our poles or poles holding our wires, which were being removed. I did not notice at that time how many poles there were. I saw one transformer set on the curb line. When I went by, four or five men were engaged in the work. I saw a city truck there. I do not recall seeing Mr. Irvin. I saw Mr. Heath. I think I recognized a man by the name of Lysle Stewart. The wires, which had been removed from the poles were hanging up. The trees seemed to hold them off the ground. Had it not been for the limbs, I think they would have been lying on the ground. The cross-arms in some cases were still attached to the wires holding them apart. The cross-arms weighted down the wires and some of the wires were in contact with the trees. Those lines carried 2200 volts.

When I got to the office, I called Mr. Turkle, the manager, at his residence. Our line gang restored the lines, which had been taken down that morning. After lunch, I was out to the place where the lines had been taken down. It was on the south side of Main Street from Church Street west to Pleasant Street. It would cover four average city blocks. Ohio Electric Power Company put in new poles of their own and reattached the lines to those poles.

The lines ordered removed in plaintiff's Exhibit 51 were taken down by the City of Norwalk.

The lines ordered taken down in plaintiff's Exhibit 52 were taken down by Ohio Electric Power Company.

The section of line ordered taken down in plaintiff's

Exhibit 63 on Benedict Avenue, from Olive Street south to the residence known as No. 196, was taken down by Ohio Electric Power Company. The wires on East Main Street, extending from the transformer on the north side of the street in front of No. 170 crossing the street and extending one span east to the property known as No. 176 East Main Street, was taken down by Ohio Electric Power Company. The three-phase 2200-volt line on North West Street, from West Main Street north to Jefferson Street and thence on Jefferson Street to Wheeling Avenue, was taken down, but to my knowledge the company did not take the wire down, and I did not see the city take it down, but it was taken down.

In plaintiff's Exhibit No. 57, I think there is an error in that one of the streets is characterized "Water Street," and I imagine it to be Railroad Avenue. That line has been taken down but not by Ohio Electric Power Company, and I did not see that removed either.

The secondary wires on Cline Street have been removed by Ohio Electric Power Company. The ones mentioned in the third paragraph were removed by the city; the ones in the fourth paragraph were removed by Ohio Electric Company; and the wire referred to in the fifth paragraph was not removed. It is on West Elm Street but is still up. I believe our manager received a letter from some city official that we were allowed to leave it there.

The lines mentioned in the first paragraph of plaintiff's Exhibit No. 58 were taken down by Ohio Electric Power Company. The next paragraph refers to the cable and conduit that Mr. Turkle testified to.

The lines, referred to in plaintiff's Exhibit No. 59, were taken down by Ohio Electric Power Company.

The section of lines, referred to in first paragraph of plaintiff's Exhibit 61, was removed by Ohio Electric Power Company. The wires, referred to in next paragraph, still remain. The lines, referred to in next paragraph, have been removed by our company, and the lines, in the next paragraph, have, also, been removed by our company, and the lines, referred to in the next paragraph, have been removed by our company. Likewise, as to the lines mentioned in the next paragraph. All the lines, referred to in those paragraphs, except one on State Street, have been removed by our company. One wire of the three-wire service on East Main Street running west from No. 117 West to the transformer has been removed by our company. The last line is still there on private property.

Plaintiff's Exhibit No. 62 signed by Mr. Irvin and Mr. Webster, director of public service, refers to the same section of line, which was involved in the episode of late October, 1927, I mean the lines and poles, which the city workmen took down on West Main Street.

The sections of lines, mentioned in plaintiff's Exhibit No. 63, have been removed, but I don't know who removed them.

The lines, mentioned in the first paragraph of plaintiff's Exhibit No. 66, were removed, but not by our company. The lines, referred to in the second paragraph and the next two paragraphs, were removed by the Ohio Electric Power Company.

There is a joint use of poles being made by the city and the Ohio Electric Power Company in Norwalk and has been in effect as long as I have been connected with the company in Norwalk. About 50 poles of the Ohio Electric Power Company are used by the city for the support of its lines in some way, and about 70 poles of the city are used by Ohio Electric Power Company for the support of its lines in some way.

Plaintiff's Exhibit No. 49 is the general layout of the streets of the City of Norwalk. These sections, marked with heavy red pencil, represent wires and lines removed. That exhibit is substantially an accurate picture of the distribution system of the Ohio Electric Power Company in the streets and alleys of Norwalk at the present time. The symbols in the lower right-hand corner, indicating respectively the Ohio Electric Power Company's poles and the Telephone Company's poles, etc., are correctly shown upon this exhibit.

During September, 1927, new No. 4 wire was put in from the plant north on Linwood to Main, east on Main to W. & L. E. Railroad, thence north to The Wisconsin Food Products Company. When this one wire was added, there was already a line over that territory to The Gallup Ruffing Company. The line from The Gallup Ruffing Company to The Wisconsin Food Products Company is on private property.

The slip on the lower part of the exhibit stating that during November, 1927, three new No. 6 W. P. wires were put in from Norwood to Dairy and service was secondary three-wire No. 4/0 is correct. When that wire was put in there was at the time a line extending over the same route.

The key to plaintiff's Exhibit No. 50, as shown by the use of different colored lines and the explanations thereof in the lower right-hand corner, is correct. I have

carefully examined plaintiff's Exhibit 50 to ascertain whether it correctly depicts changes which occurred in the system of the Ohio Electric Power Company in the streets of Norwalk since sometime in 1925, and said Exhibit 50 correctly shows the changes which have occurred in the system in the streets of Norwalk of the Ohio Electric Power Company in that period. I, as service man and lineman for the Ohio Electric Power Company, have been, during that period, in such touch with the actual physical changes in its system in said city that I can say that Exhibit No. 50 does correctly depict the changes which have occurred.

Mr. Boxell:

We will now offer Plaintiff's Exhibits Nos. 49 and 50.

CROSS EXAMINATION

By Mr. Craig:

The symbols on Exhibit No. 48 represent the poles that belong to the Ohio Electric Power Company, but some of these symbolized poles belong to the Telephone Company, and there are no marks here to indicate the lines of the City of Norwalk, but only the lines of the Telephone Company and the Ohio Electric Power Company. As you go west on the south side of West Main Street from the intersection of Whittlesey and Benedict Avenues, these "O" symbols belong to the Telephone Company clear out to West Street, but where there is a heavy mark inside the circle those are Ohio Electric Power Company poles.

The Lake Shore Electric is using some of these poles for span wires, but the poles, which The Lake Shore Electric is using are not indicated on this map. It is a fact that wherever the presence of poles belonging to the Ohio Electric Company is indicated on Exhibit No. 48, there are also poles and pole lines for the transmission of electricity on the same streets operated by the Municipal Plant of the City of Norwalk. Those lines are not indicated. I had nothing to do with the preparation of Exhibit No. 48. I saw it first after it was made in our office in 1925, I think. Our lines seldom run over a block, without having a consumer on the line. I do not believe there is one full block any place, but there may be on West Street.

These heavy red lines on Exhibit No. 49 indicate spaces where lines have been removed without replacement. My knowledge as to Exhibit No. 49 is about the

same as my knowledge with reference to Exhibit No. 48, and that is equally true with reference to Exhibit No. 50. I was over this line just a few days ago and checked over these removals to be sure I was right. The wires on Pine Street have been removed on orders from the city and there have been no replacements. On parts of our lines we took down wires and replaced new wires, but there have been no replacements at all where these red lines are shown.

When the line was extended out East Main Street in an easterly direction to the Huron Division of the Wheeling & Lake Erie Railroad and then extended down an alley or side street to the plant of Wisconsin Food Products Company, I was not with the company. It has been rebuilt now, but not extended. There was an extension made on private property from The Gallup Ruffing Company to the plant of The Wisconsin Food Products Company.

Plaintiff's Exhibits 49 and 50 were received by the court.

Thereupon the plaintiff called as a witness in its behalf

JOHN A. NESTER,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Welles:

I reside at Lakewood, Ohio, and am a railway superintendent, connected with The Cleveland & Southwestern Railway & Light Company. I was connected with the Northern Gas & Electric in 1899 to 1904, engaged in operating the electric light and power system in the City of Norwalk, Ohio. First I was with The Northern Gas

& Electric and later with The Norwalk Gas & Electric. I left Norwalk in the early spring of 1904. I was local manager for those companies and of this particular plant and distribution system. These companies were predecessor companies of the Ohio Electric Power Company. I was familiar when I was there with the distribution system and have a recollection now of what the conditions were when I lived in Norwalk, in a general way. There were certain lines of wire and poles on certain streets, which were used only for commercial lighting purposes in 1904, and there were other lines of poles, which carried both the commercial lighting wires and the street lighting wires, and there were some poles, which carried only street lighting wires. The direct current was used for street lighting and the alternating current for commercial lighting. The incandescent lights then in use in the City of Norwalk could not be serviced and supplied with current from the street lighting system.

CROSS EXAMINATION

By Mr. Craig:

I was acquainted with Silas T. Crawford, who lived in Norwalk and who procured some of the rights-of-way for The Cleveland & Southwestern Traction Company, when it built its line from Oberlin to Norwalk. So far as I know Mr. Crawford had not been one of the officials of the company and I never knew of his having any title or authority. I could not name the streets, which were supplied with commercial lines, without the presence of the lighting lines. It is possible I could name a single street. I think Hickory Street was one. It is about two blocks deep and extends off from Linwood Avenue. I remember that was one instance where we ran a line. There were one or two residences on Hickory Street. I can not designate another street, other than this. With our direct current lines, used for street lighting system, we could not cut those and duck here and there, like we did with the commercial lines. The A-C lines had to be handled differently from the direct current. We ducked over here to this corner and ducked over there to that corner for that intersection, but the territory in between, some of those streets, was taken care of by commercial light lines and poles only. In the main, I would say both systems occupied the same poles, in many instances they were both on the same line of poles.

I had charge of The Cleveland & Southwestern Traction Company's generating plant at Norwalk and was

acquainted with the type of machinery used. I have not been in there for 15 years. I remember when B. P. Foster, as manager of the Northern Electric Company, built that plant on the Wheeling & Lake Erie. There was no new machinery put in there since it was built so far as I know, except such as was put in during the time I was local manager to furnish power for The Cleveland & Southwestern Railway. When it built into Norwalk, we made arrangements with it to furnish power for the west end of its lines, and we put in additional machinery at that time for that purpose. It was not a sub-station. We put in extra boilers and a generator, but it was not used as a sub-station. It was a generating plant. It was for regular service and we furnished the power to operate its cars on the entire west end. Our tracks came to the east city limits and then came over the tracks of The Lake Shore Railway, and after reaching its tracks we used its electricity.

Upon the conclusion of Mr. Nester's testimony, Mr. Eversman for defendant offered, in connection with the cross examination of Mr. Insull, Defendant's Exhibit D, to which there was no objection.

Then Mr. Welles, on behalf of plaintiff, withdrew original Exhibit No. 1 and substituted therefor another Exhibit 1, which was admitted as Plaintiff's Exhibit No. 1, with the reservation of objections thereto by defendant to the relevancy and materiality of the part thereof relating to payment of taxes by the Ohio Electric Power Company.

Plaintiff's Exhibits Numbers 70, 71, 72, 73, 74 and 75 were admitted. The following stipulation was then made between counsel:

"It is stipulated and agreed between the parties that at least since the year 1912 the office of director of public service and the office of director of public safety of the City of Norwalk have been combined and have been held by one person exercising the powers, duties, and authority of both offices."

Plaintiff's Exhibits Numbers 67, 68 and 69 were offered separately, it being agreed by counsel that there was no question as to their authenticity, sending and receipt. The counsel for the defendant objected to their introduction upon the ground that they were irrelevant and immaterial to the issues of the case. The exhibits were accepted by the court and exception allowed. The plaintiff then rested.

Defendant's Exhibits E and J were admitted without objection by the plaintiff. Defendant's Exhibits F, H and I were admitted over the objection of plaintiff's counsel that they have no bearing upon the issues in the case, the plaintiff reserving an exception to the admission of each of them. Defendant's Exhibit G was admitted over the objection of plaintiff's counsel that it has no bearing upon the question as to whether plaintiff's mortgagor has a perpetual lighting franchise, that there is no plea of estoppel on the part of the city against the plaintiff to the effect that plaintiff is estopped to claim a perpetual franchise, that it has no bearing upon plaintiff's plea that the city is estopped and is in no way binding upon the plaintiff. Plaintiff reserved an exception to its admission. Defendant's Exhibit C was offered in evidence by the defendant, to which plaintiff objected on the ground that it had no bearing upon the issues in the case, that it was not prepared by the plaintiff, that it was an admission against interest by someone not a party to the case and not binding upon the plaintiff. It was admitted over these objections with plaintiff reserving an exception to its admission.

It was then stipulated by counsel that F. E. Meyers of Ashland, Ohio, was president and director of The Cleveland & Southwestern Traction Company during the years 1914 to 1915, both inclusive.

Thereupon defendant called as a witness in its behalf

C. B. LAWRENCE,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Martin:

I have resideed at Norwalk, Ohio, for 35 years and operate there a general insurance agency. I was a member of the Council of the City of Norwalk in 1924 or 1925. I lived in Norwalk in the years 1914 and 1915, and recall attending a meeting held in the council room relative to the electric light situation and remember when Mr. Myers—I think F. E. Myers—who was president of The Cleveland & Southwestern, was there.

The plaintiff was allowed a general objection to all testimony of C. B. Lawrence, George W. Fifner, and Fred B. Cole relating to statements of Mr. F. E. Myers or other officers of The Cleveland & Southwestern Traction Company requesting or relative to a franchise or rights for such company in the City of Norwalk, upon the ground that there is no claim by the city that plaintiff is estopped to claim a perpetual franchise, that such testimony has no bearing on plaintiff's claim that the city is estopped to deny that plaintiff has a perpetual franchise, and not binding upon the plaintiff and all such testimony was received over such objection and a general exception thereto was allowed.

The meeting was in the autumn or winter of 1914 and was prior to the completion of the Municipal Plant. It was a kind of indignation meeting of the citizens on account of the poor service, which had been given. I don't know that Mr. Myers stated specifically, but it was generally understood that Mr. Myers was president of The Cleveland & Southwestern Traction Company. Mr. Myers was asked, as I recall it now, why they were not giving us better service. Mr. Myers said they could not go ahead with further improvements, unless they obtained a new franchise. No cross examination.

Thereupon defendant called as a witness in his behalf

GEORGE W. FIFNER,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Martin:

I have lived at Norwalk, Ohio, 46 years. I have been a councilman of the City of Norwalk since 1907, with a lapse of two years, and was councilman in the years 1911 to 1915, inclusive. During that time, I recall meetings of the members of the council and the city administration with officials of The Cleveland & Southwestern Traction Company and remember a meeting held in the evening, to which the general public was invited in 1914. I was present, and Mr. Myers, who was president of The Cleveland & Southwestern Traction Company, was also present.

Upon the matter of a franchise, Mr. Myers said he could not give us any better service unless he had another franchise, a renewal of franchise.

I was at two meetings, when Mr. Myers was present. The other meeting was about 1914, the second meeting. It was a mass meeting. At this second meeting Mr. Myers talked along the same line, practically the same thing, that he could not give us any better service because they wanted a new franchise, and until they got it, they could not.

The two meetings were about seven or eight weeks apart.

No cross examination.

Thereupon the defendant called as a witness in its behalf

FRED B. COLE,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Martin:

I have lived at Norwalk, Ohio, since 1890, and have served as a city councilman six terms of two years each. I was a member of the council in 1913, 1914, and 1915. I remember a public meeting held, attended by members of the city administration, the public in general and certain people from The Cleveland & Southwestern Traction Company, in 1914, in the council room. I was present. Mr. Wolfe, Mr. Ginn and Mr. Myers were present for The Cleveland & Southwestern Traction Company. Mr. Frank Ginn was their attorney and, I think, Mr. Wolfe, was their attorney, representing the company in some way, I don't know just exactly. Both Mr. Ginn and Mr. Wolfe were from Cleveland and they made representations to the council or to the meeting for a renewal of the franchise. Mr. F. E. Myers was also there. I did not hear him say what office he held.

"Q. Do you know as a matter of fact whether he was president of The Cleveland & Southwestern Traction Company at that time? A. His name appeared on their stationery at that time."

In answer to the opposition at that meeting, on account of poor service that had been furnished to Norwalk, he said he was surprised to hear it; that it never came to his notice before; and that if they were given a new franchise, as an officer of the company, he would guarantee an improvement in the service.

I was present at another meeting and had a conversation with Mr. Myers after the meeting had adjourned. Mr. Myers was talking to me and two other members of the council that were there. He said that he wished the franchise, and if he did not get it we would lose the railroad because the pump works could not stand the strain of supporting the railroad any longer. Nothing was said about the length of franchise they wanted.

No cross examination.

Thereupon the defendant called as a witness in its behalf

BURT P. WEBSTER,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Martin:

I live at Norwalk, Ohio, and during the last three or four years held the position of director of public service, which carries with it the position of director of public safety in Norwalk. I acted as such from September 1, 1926, to February 1, 1929. During that time, Mr. Irvin was manager of the electric lighting and water works departments. I recall a conversation with Judge Suhr and Mr. Craig about the time an action was brought by the city against Ohio Electric Power Company.

"Q. Do you recall about the time the action was brought by the city against the Ohio Electric Power Company, a conversation with Judge Suhr and Mr. Craig relative to an injunction? A. Yes, sir.

Q. What did they tell you at that time?

Mr. Welles:

Objection to any conversation between counsel for the city and the city officials.

The Court:

What is the purpose of it?

Mr. Martin:

To show they had been notified that there was an injunction—I meant quo warranto action by the city against the Ohio Electric Power Company, or previous action, to show that the instructions were sent to the city administration and that they were followed out relative to the injunction. It is claimed here that the city officials violated that injunction.

The Court:

You do not claim they violated any injunction.

Mr. Welles:

No, Your Honor. You mean an agreement.

Mr. Martin:

I mean an agreement.

The Court:

An agreement prior to the injunction of the state court?

Mr. Martin:

Yes.

The Court:

All right. Proceed.

Mr. Welles:

Note an exception.

Q. Do you recall what they told you at that time relative to the agreement entered into? A. They made an agreement with the attorneys for the Ohio Electric Power Company that the lines should not be disturbed."

I remember a certain day in October, 1927, when Mr. Craig and Judge Suhr called my attention to some property that had been torn down. I was then director of public service and was just coming out of my office, when they informed me some property had been destroyed. Previous to that time, and at no time, did Mr. Irvin or anyone else destroy any property, cut down any wires or poles of the Ohio Electric Power Company, with my knowledge or consent.

Mr. Irvin's official position was superintendent of light and water. He had occupied that same position under a prior director of public service, Mr. Leighton.

Referring to the map, showing the pole line on West Main Street and on the south side thereof between Church Street and West Street, I did not at any time instruct or order anybody to tear down any poles or wires of the Ohio Electric Power Company, and none were torn down with my knowledge or consent; nor was I informed that such action was going to be taken. I went out on West Main Street the day this matter was called to my attention, and the poles, which were down, were between Church Street and South Pleasant Street, west of The Wheeling & Lake Erie overhead bridge on the south side of West Main Street. These poles and wires were not taken down with my consent or instruction. I had inspected those poles along Main Street previous to that time and some of them were in very bad condition. The telephone company's poles had been in there a long time and were badly rotted at the bottom, so that some of them would surely swing. Most of the poles leaned in towards the street. The year before, an accident had occurred in that same location, where those poles were, but I did not make any inspection then. The telephone poles had been erected a long time and were in bad condition. I gave orders to the telephone company for the removal of those poles.

Plaintiff's Exhibit No. 62 carries my signature and it was sent out by Mr. Irvin. The telephone company had taken most of its wires off the poles that were taken down, and had laid a conduit, but there was still some

contact. The wires had been taken down by someone. There was just a limited use by the telephone company at that time. The telephone company had taken down some of the drop wires, but not all of their wires.

CROSS EXAMINATION

By Mr. Boxell:

I was aware of the passage by the city council of the ordinance of July 1, 1924, regulating the construction of poles, lines and wires by telephone companies and electric light companies in the City of Norwalk, and I knew that I was charged with its enforcement and I tried, at all times, to carry out the terms of that ordinance.

"Mr. Eversman:

This evidence may all go in under our objection and exception that it is entirely irrelevant and immaterial what he did under the ordinance.

"The Court:

I suppose the only thing relevant is what they did with this particular company. That certainly is relevant.

"Mr. Eversman:

Whatever they did with respect to the ordinance of July 1st, 1924, we conceive to be an irrelevant issue in this case.

"The Court:

This testimony may go in over your objection. A decision on the merits will determine whether it will stay in."

Plaintiff's Exhibit No. 62 is copy of a letter addressed to The Local Telephone Company at Norwalk bearing the signature of Mr. Irvin and my signature, as director of Public Service. The poles, referred to in that letter, were located between Church Street and 200 feet west of South Pleasant Street on West Main Street, in the region where the poles were torn down in the episode of late October, 1927. I was out there after they were torn down and saw some of them that were down. The poles were down, but the wires were not down. They were supported by poles which held them up. The wires were 10 feet or more above the ground. They had cross-arms attached to them. I think the cross-arms were hanging by the wires in some places, but not many of them.

I was apprised of an agreement by Mr. Craig, in 1927, under which the city would not attempt to move

any lines of the Ohio Electric Power Company, and I understood that during that time that company would not attempt any extension of its lines. The poles, referred to in Plaintiff's Exhibit No. 62, in some places supported the Ohio Electric Power Company's lines. Before issuing Plaintiff's Exhibit No. 62, I don't remember getting in touch with Mr. Craig, relative to issuing it. I don't think I did.

At the time the order was given in Exhibit No. 62, the telephone company had its own pole line in there. There were three pole lines in there on this one street, and there were places where it was necessary to make contacts with these poles, in order to keep the wires free from the poles. Some of the poles had been erected for a long time and the wires ran parallel, and in order to carry so many wires it was necessary one set of wires had to keep a certain distance from the other set of wires. The lines of Ohio Electric Power Company may have had contact with the poles referred to in Exhibit No. 62. By contact, I mean keeping them free from swinging on other wires. They had to be fastened to these poles, but I am not a lineman and I don't know whether they were fastened to these poles or not. I had observed conditions there before, of the lines and the poles. The lines were all mixed up, and in this mess of poles it was almost impossible to tell which company owned a particular pole. To be acquainted with the condition of the pole lines was rather up to the superintendent of light. He worked under, and took orders from, me. It would be a hard matter for a man in the office to understand all the lines in the city. It was within my duties according to the statute, yes.

There might have been contact between these particular poles referred to in Plaintiff's Exhibit No. 62. The line of the Ohio Electric Power Company may have had some contact there, but I could not tell the particular pole. I did not have that possibility in mind, when I issued the order.

Lines of the telephone company, The Lake Shore Electric and the Ohio Electric Power Company were all in there, and when I issued the order, I was aware of the condition. I do not know that I went over the line. I did not endeavor to discover whether these particular poles, which I was ordering down, supported lines of the Ohio Electric Power Company. The poles, referred to in the second paragraph of Plaintiff's Exhibit No. 62, were all in a dangerous condition and they had to be removed. Referring to that second paragraph, we had in

mind that the poles were in a dangerous condition and should be removed; that there was a pole condition there that was out of all reason. There were too many poles along that street. The Ohio Electric Power Company had its own poles to support its wires at this point, and those poles were in a very dangerous condition. There were three pole lines, practically four pole lines, and there were poles so scattered that there were two or three in a huddle. Referring to the second paragraph of Plaintiff's Exhibit No. 62, it meant that they could not sell those poles, that they had no right to dispose of them. The "tenants" there referred to were The Lake Shore Electric and the Ohio Electric Power. I was covering the whole situation and had in mind both the Ohio Electric Power Company and The Lake Shore Electric. I no not remember of taking up with Mr. Craig the issuance of that order; it may have been taken up with him. I did not take the matter up with the mayor, the council, or any official of the city. I had been informed of the agreement between representatives of the Ohio Electric Power Company and the City of Norwalk. I did not direct or instruct Mr. Irvin to carry out the things stated in this letter, Plaintiff's Exhibit No. 62. I did not withdraw this order. At the time it was written, July 30, 1927, I do not remember whether Mr. Irvin signed it in my presence. This letter was dictated by Mr. Irvin and I recall that he brought it to me for my signature and thereafter I signed it. It was mailed to the Northern Ohio Telephone Company and this particular copy to the Ohio Electric Power Company. It went either out of my office or Mr. Irvin's office. I never instructed Mr. Irvin to carry out these orders. We had no intentions of carrying it out. That is, I never instructed Mr. Irvin to carry out this order. I never instructed Mr. Irvin to carry out or not to carry out the orders contained in Exhibit No. 62, but I mailed the letter to the telephone company and the Ohio Electric Power Company and after that time I don't think I gave him any instructions.

That is my signature on Plaintiff's Exhibit No. 64, as director of public service. I caused that letter to be mailed to Mr. Turkle, manager of Ohio Electric Power Company and in so doing I was proceeding under the ordinance of July 1, 1924.

It is my best recollection that I received the original letter, Plaintiff's Exhibit No. 65, and it has reference to the same situation as involved in Exhibit No. 64.

Upon receipt of the original of Plaintiff's Exhibit No. 65, I did not follow up the request contained in my

letter of September 22nd, Exhibit 64, on account of our agreement. Both exhibits refer to the same situation. The Ohio Electric Power Company were extending their lines, enlarging, that is putting on new wires from their power plant to the Butter Factory on East Main Street, and we seriously objected to their extending lines at that time. That is the objection in Exhibit No. 64. They were taking down poles and replacing them with new poles, putting up a heavier wire all the way through and extending their lines, which was contrary to our agreement. They were taking down some poles and replacing them with other poles. When they took down poles, they had to take the wire off. One does not have to take wires down to put new poles in, but it is necessary to loosen the wire, and then another pole is put in its place and the wire put back. They were stringing new wires a part of the way over the same route, and I objected to that verbally and in this Exhibit No. 64.

In Exhibit No. 65 the Power Company notified me that the changes contemplated were the repairing and reconditioning of the line, and we accepted that statement. They were renewing their lines contrary to the agreement. It was my duty to see that the lines were reconditioned and kept in good condition. The poles they were putting these on had been ordered removed. They were owned by the Telephone Company. The Ohio Electric Power Company stated that it had purchased the poles, but I was never shown the bill of sale. Those poles were very unsightly and located on Main Street, our best street, and had been ordered down. The poles were not in good condition. They were just stringing new wire. After that, I did not make any further demands on the Power Company as to that line but not because it had been put in good condition.

In Plaintiff's Exhibit No. 67, written by me, as director of public safety, to the Ohio Electric Power Company, Norwalk, Ohio, I required the company to move some poles and equipment along this street, while the repair of the street was under way, and part of the removal was done pursuant to my instruction.

The letter of September 22nd, Exhibit No. 64, refers to something that was contrary to the agreement that had been made between the attorneys.

I did not write Exhibit No. 64 under the terms of the ordinance of July 1, 1924. I did, however, as far as possible, when I considered it necessary, instruct the Ohio Electric Power Company to abide by the terms of that ordinance.

In certain instances, the Ohio Electric Power Company, while I was director of public service, removed a number of sections of its lines, pursuant to instructions from me. Sometimes I conferred with the mayor of the city about these various situations. Mr. Irvin looked after the lines. I do not recall that I ordered out many lines or poles, except instances where we had poles on streets that were going to be paved.

Plaintiff's Exhibit No. 68 is signed by Mr. Weidemaier, as mayor. That is his signature. I was very well acquainted with him. I may have conferred with the mayor on the situation, mentioned in that letter. I served under two mayors, but I do not remember that particular incident. I did have some talk with the mayor. This exhibit was directed to the Ohio Electric Power Company, because it was violating its agreement with the City of Norwalk. I knew that from time to time Mr. Irvin issued letters over his signature to the Ohio Electric Power Company instructing it to take down certain sections of its lines, pursuant to the ordinance of July 1, 1924. There were not many of those orders issued during my administration, if I recall. Mr. Irvin had no authority to go ahead on those lines, because I had no way of knowing just what lines had been abandoned. He was more particularly in touch with the actual physical facts. I had never given him blanket authority to go right ahead and issue orders. Mr. Irvin would bring the letters to me, when he sent them as a rule. In each instance, he would do that and receive my authority for sending them. After our agreement, it was not the practice for him to go ahead and see that the instructions contained in the letters were carried out. Mr. Irvin understood the instructions that no lines of the Ohio Electric Power Company should be disturbed. These instructions were given to Mr. Irvin at the time of the agreement between the attorneys, but I do not remember the date.

Plaintiff's Exhibits Nos. 63 and 66 refer to the ordinance of July 1, 1924, but Mr. Irvin did not have my specific approval to the removal of those sections of lines. We were issuing those in pursuance of the ordinance. He had my specific approval on those letters, and I think the Power Company took down some of the lines; I do not recall and would not say because I was not in close touch enough to know exactly. They may have taken some of the lines down.

"The Court:

What is the situation, did Mr. Irvin have authority to go ahead, or did he have to have his action approved or ratified under the law, Mr. Boxell? What do you say about it? Did Mr. Irvin have a right in his official position to go ahead and do these things, or did he have to have specific authority from the director of public safety and service?

Mr. Boxell:

No, I don't think he did, Your Honor. I would not think he would. He would have to have specific authority from the director of public safety.

The Court:

All right.

The Witness:

Those orders were not carried out." I said a moment ago that I thought some of these lines were taken down. Those letters were issued in pursuance of the ordinance; and it was my duty to enforce the ordinance. From time to time, I appeared before the city council of Norwalk and sometimes reported to them upon the discharge of my duties. I do not remember that the ordinance of July 1, 1924, was the subject of discussion before the city council. The council made these laws and we had to follow them. I have no recollection of ever giving the city council of Norwalk any report as to what I was doing under this ordinance, nor do I have any recollection of ever discussing my action in having certain sections of lines of the Ohio Electric Power Company taken down.

RE-DIRECT EXAMINATION

By Mr. Martin:

Judge Suhr was city solicitor during the time I was director. Exhibit No. 64 related to the replacing of the Local Telephone Company poles from East Main Street with new poles by the Ohio Electric Power Company. They replaced their old wires with new wires of heavier copper.

I recall meeting Mr. Kreider, the man from Sidney, who testified in this case, and it was when the Ohio Electric Power Company was replacing its old wires with new ones that I had a talk with Mr. Kreider and asked him to discontinue the work on the line.

RE-CROSS EXAMINATION

By Mr. Boxell:

In relation to the extension I have just mentioned, in connection with the line on East Main Street, I tried to find out on whose property the extension was located. It was a feeder out East Main Street and went to The Gallup-Ruffing Company. From there the Power Company built an extension to The Wisconsin Food Products Company, a portion of which was on private property. With the exception of perhaps one pole, it is on private property, but I would not be sure that even one pole was in the city street, unless I made a survey. The work on the line consisted of replacing poles and installing heavier copper wire.

Thereupon the defendant called as a witness in its behalf

CHARLES SUHR,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Craig:

I reside at Norwalk, and have been engaged in the practice of law for thirty or forty years and maintain an office in the City of Norwalk, Ohio. For six years, I was Judge of the Probate Court of Huron County and since then served seven years continuously as city solicitor, assuming my duties as solicitor May 1, 1923, my term of office expiring January 1, 1930.

About October 26, 1927, while I was city solicitor, I heard that some poles on the south side of West Main Street in the vicinity of Church Street were being disturbed. Mr. Craig notified me of that fact by telephone,

between 7:00 and 8:00 o'clock in the morning. I met Mr. Craig either at my home or at the corner of Garden and Main Streets, and we went in an automobile to the house just west of the Presbyterian Church. We saw some men working and I recognized some of them as city employees. I am not sure about the others. We asked them what they were doing and they told us, and we insisted upon their stopping, and they immediately did so. I think they were in charge of Mr. Higgins. They stopped work, but I do not recall whether they went away. We went to the city office and met Mr. Webster, who just preceded me on the witness stand. We asked Mr. Webster if he had anything to do with the removal of poles on West Main Street. He said "No" he had nothing to do with it and did not know anything about it. We then went to the office of Mr. Irvin upstairs. He was not there. We did not see him. I did not see him for some time afterwards. I think that I had some conversation, regarding what was going on, with Mr. Pruner over in the court house. Mr. Pruner said he was going to file a petition for injunction and we said the men would do nothing further.

Aside from the quo warranto case commenced in the Court of Appeals and which went from there to the Supreme Court of Ohio, and in this case now pending on hearing, Mr. Craig had not represented the City of Norwalk at all during my time, except about seven years ago he represented the city in a case against New Amsterdam Casualty Company on the city treasurer's bond, about the time I came into office. Aside from that, Mr. Craig did not have anything to do with representing the city to my knowledge.

I attended all the council meetings of the city and do not think I missed one in seven years. I looked after all legal matters pertaining to the city, except the two cases in which Mr. Craig assisted. Mr. Craig did not resign that I heard of.

CROSS EXAMINATION

By Mr. Welles:

I expect I was in Norwalk January 3, 1930. I do not recall that I was out of the city; I might have been, but not very far. I do not remember that on that date, or at any time, Mr. Craig informed me that Mr. Boxell and Mr. Pruner had called upon him with a request that the city agree to allow the State Court injunction to remain in effect without contest, pending the outcome of this case

in the United States Court. I was not city solicitor on January 3rd, and Mr. Craig never told me about an interview between himself, Mr. Pruner and Mr. Boxell. I am positive of it. Mr. Bracy succeeded me as city solicitor. I did not continue to represent the city in the quo warranto case as special counsel, or in any other way, after my term of city solicitor expired. My understanding was that the case was closed.

Thereupon the defendant called as a witness in its behalf

M. G. IRVIN,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Eversman:

I have lived at Norwalk, Ohio, seven years and five months. I am superintendent of the electric light and water departments of the City of Norwalk, and have been such for seven years and five months. It is an appointive office under civil service. My employment is continuous, subject to good behavior. My signature appears on Exhibit No. 62 (witness reads Exhibit No. 62). I dictated that letter and knew the contents. My reason for writing that letter was as a matter of safety, as a dangerous condition existed on West Main Street section of Norwalk. There were quite a few poles along the south side of West Main Street containing three actual pole lines on the same side of the street, very close together. Some of them were rotted off at the bottom. There were heavy trees along between the poles and the sidewalk and the tree limbs pressed against the wires, causing the poles that broke off to extend out over the street. About one year before the writing of that letter, a young man, who

was in an automobile, had been killed in that section, one of the poles leaning out far enough so that it struck his head and crushed his skull. That was July 4, 1926. From then on, until the Telephone Company abandoned their pole line, there were several slight accidents of trucks hitting the poles. The Telephone Company put in an underground cable construction through that area, wherein those poles were located, and I understood at that time that it agreed to take out its poles, provided it got permission to put a cable underground. Being in charge of the electric light department, and feeling the responsibility for the safety of the people from electric wires and poles, I investigated that district and found that there were quite a few poles that were in a dangerous condition, that should be removed, for the safety of human life. The poles, which were in a dangerous condition, belonged to the Local Telephone Company. I proceeded under the ordinance of July, 1924, to notify the Telephone Company that it had vacated those poles, and stated in that letter the provisions of the ordinance in that respect. The Telephone Company did not take down the 21 poles, referred to in the letter of July 30, 1927, Exhibit No. 62. Late in October, I proceeded to take the poles down, the ones that were vacated, and the ones which the Lake Shore Electric, or some other utility had cleared up as far as possible, removing nine or ten of the 21 poles mentioned in that letter. I did not remove any poles not referred to in the letter. The poles were removed about October 26, 1927. The day before, I went over the area, looked over the poles, and marked the poles which were to be removed and ordered the men to report at four o'clock on the following morning. I marked the poles by blazing them with a hand axe. These poles were all located on West Main Street, south side, between Church and Pleasant Streets. All the men, whom I had employed in the distribution department, six or seven in number, I ordered to report, and they reported the following morning at 4 o'clock. I ordered the truck driver to drive to this territory. I distributed the men along the pole line with orders to take care of the different parts of the work that would be necessary and proceeded to take the poles down. The poles, which I marked, belonged to the Local Telephone Company. I had its superintendent, J. L. Campbell, point out to me the poles which they owned in that area. That was done a few weeks prior to October 26th. After distributing the men and instructing them as to the work they were to do, I later

came along and told them to put the poles up on the boulevard, so that there would be no injury to traffic; I then told them that as soon as this work was done, they might get their breakfast and then report to work at the usual time. That was about 7:30. Then I went on out to the city's electric lignt plant and went about my duties, reporting back to the office at possibly nine or ten o'clock. The poles cut down were nine or ten in number.

Those poles, which were not broken off, we sawed off at the ground and I personally superintended the work of cutting down the poles or removing them. The poles, which were broken off, we had to hold up. They were held up by the wires and the trees. The poles, which we removed, were all very rotten at the ground. The ones we sawed off showed some wood, but it was very rotten. I would say 75 to 80 per cent of the original stock was rotted away. Others were rotted clear through. In my opinion, the continuance of those poles in the condition they were in, on the street, was a danger and menace to life and property. They were several wires of the Ohio Electric Power Company on those poles. I would not be able to say how many had contacts from Ohio Electric wires.

A contact is where an existing pole line has a wire of another company near enough to it to make it dangerous. A bracket and insulator are attached and the wires tied in to keep the wind from blowing it into the pole and to hold it firm, and space it. That is a contact. In the instance where these poles, which were cut down, had contacts with Ohio Electric Power Company, I removed the contact before taking down the pole.

After the poles were removed, the wires were tied in on cross-arms, which were on some of the poles. We took a hand iron and tied it to the cross-arm and suspended it to another pole or limb of tree to hold it up in the clear of any machine that might go in the driveway, or any person. When there were no cross-arms, we took a hand iron and tied the wires up, whichever was necessary to make a clearance over the sidewalk. I consider that method of handling those wires was perfectly safe to life and property. There were no transformers on the poles we took down. Among the 21 poles in the area, there were some transformers, but none on the poles which we removed. I did not take down any transformers at all.

The reason why I asked the men to report at four o'clock was that since the mailing of that letter to the

Telephone Company I had strong information—rumors you might say—through employees, that they were going to patrol that territory and make trouble if we attempted to put that ordinance into effect. Also, we were very busy at that time, and carried a very small force of men; and that is really one reason that dragged us along over the 30-day period. We did not have time to get at it. Those were two causes that made me get the men out early in the morning and expedite the work and get it done. Although this letter of July 30, 1927, Exhibit No. 62 refers to 21 poles, I did not remove all the 21 that morning, because some of them had Telephone Company drop wires, service wires, attached to go into the house from the other side of the street where the underground line was. We did not remove them. Some of them had Ohio Electric transformers on and we did not remove them. A couple of them were supporting the Ohio Electric wires in a way that we could not make the wires safe if we took the poles down. There was no equipment of the Telephone Company on the nine or ten poles which we removed.

After writing the letter of July 30, 1927, Exhibit 62, I did not have any further talk with the director of public service about these poles referred to in the letter.

(Witness handed Exhibits K to O.)

Exhibit K is a photograph taken November 11, 1930, of an Ohio Electric Power Company pole and transformer, 2200-volt primary line, secondary service, located on East Main Street, in front of 200 East Main Street. I was present when these pictures were taken.

Exhibit L is a photograph of Ohio Electric Power Company pole in front of the residence known as 208 Whittlesey Avenue, showing a single-phase primary 2200-volt line, and a pole broken off at the bottom, leaning in the trees.

Exhibit M is a photograph of what is known as a transformer fixture on Carey Place, in the rear of the Norwalk Foundry, showing the Ohio Electric Power Company power installation for that foundry, with their primary lines and secondary lines; and also shows a pole owned by the City of Norwalk Electric Department. The foundry pole is the two poles here fastened together, and the cross-beams upon which are hanging cross-arms; and the higher pole is the City of Norwalk pole line, showing their primary, secondary and cross-arm. I mean primary and secondary wires. The two lower poles belong to the Ohio Electric Company and the taller pole belongs to the City of Norwalk.

Exhibit N is a photograph showing Ohio Electric Power Company's poles on West Main Street between the Universalist Church and the Telephone Company's building. It shows poles, cross-arms and three-phase primary, about 15 feet above the street level.

Exhibit O shows two poles of the Ohio Electric Power Company. The first pole, or the one nearest the camera, is the pole which is leaning over West Seminary Street at the corner of West Seminary and Benedict. It carries their primary and secondary lines. The farthest pole we can see, between the nearer two poles, is the Ohio Electric Power Company pole located on the corner by the jail, upon which is a cross-arm owned by the city, which was put there to support the city wires, wherever they come across to the highest pole or the middle one in the picture. That is a joint contact.

Where two pole lines exist along the same side of the street and are in conflict with each other, then it is necessary for the wires of the lower pole line to be made fast to the poles of the higher pole line, in order to keep them from burning the pole off, or injuring the linemen or citizens. The joint use of poles between the city and Ohio Electric Power Company is in the interests of safety. The Utilities Commission, in their Administrative Order No. 72, have defined pole lines as being in conflict, when they are paralleling each other, and near enough to each other that the supporting structures of one pole line, falling, will make contact with the wires of the other pole line.

I heard the testimony here of one of the witnesses to the effect that Ohio Electric Company had joint use of 70 of the city poles, and that the city had joint use of 50 of their poles. That use is parallel to the situation which I have just described, with reference to Exhibit O. Fifty of Ohio Electric poles and 70 of the city poles were so used.

On Exhibit L the pole is leaning out of plumb, possibly six feet, over into the trees, bringing the primary wires in against the limbs of the trees; and very little moisture would be required to burn the wires down, and children or citizens coming into contact with those wires might be instantly killed.

Exhibit K shows the pole leaning considerably over the street, and shows that the construction on that section of East Main Street is the same construction that was put up 20 to 25 years before. The type of insulators used on that pole, the transformer, the method of

construction, are all evidence to me that that line has not been rebuilt in 20 years.

On Exhibit M, the transformers are obsolete. Those transformers have not been manufactured in the past 20 years, and the depreciation figure on that should be close to 100 per cent.

On Exhibit N, I want to show the distance the primary or 2200-volt lines are above the street, by a comparison with a street light fixture, which is 11 feet from the top of the globe to the street line. The Utilities Commission on safety rules require 2200-volt lines to be 20 feet above any thoroughfare.

CROSS EXAMINATION

By Mr. Welles:

July 1, 1924, I had been in the employ of the city as superintendent of electric light, power and water, one year and one month. I had something to do with the preparation of Exhibit No. 38, the ordinance passed July 1, 1924. I did not prepare the ordinance. I prepared the conditions covering construction. The ordinance embodied what I suggested along those lines as applicable to all electric light, power and telephone companies, who would use the streets from then on. I was present at the meetings of the council at which this ordinance was under consideration and the attention of council was directed to what companies there were that were using the streets at that time. Mr. Ruffing, a member of the council, did that. The companies that were then on the streets were the Lake Shore Electric Company, the Local Telephone Company, The Cleveland & Southwestern, and a line known as The S. N. & M.

After the ordinance of July 1, 1924, was enacted and became effective, from time to time I served notices on the electric light and power companies, telephone company, and trolley company with reference to the provisions of the ordinance. I served such notices whenever I found conditions which appeared to me to warrant it. It was my duty as superintendent and as a citizen of Norwalk to take such action for the safety of the other citizens. I was a subordinate of the director of public service and public safety but never had any instructions from him to issue any orders. I did not receive any instructions from him that I had any duties under this ordinance.

I arrived at the conclusion that it was my duty to proceed to serve notices, because I was the only one con-

nected with the city that had any knowledge of the conditions and how to remedy them or the danger of them.

I was acquainted with the provisions of Section 10 of the ordinance of July 1, 1924, which reads as follows:

"Any extensions or constructions of existing conduit conditions not executed in conformity with the above shall be condemned and if not disconnected and removed within thirty days from the date of such condemnation, shall be disconnected and removed by the city under the direction of the director of public service and the material sold to cover costs of such work."

I did not consider myself director of public service but thought it was my duty to act as a matter of safety. I had a conversation with the director of public service about an ordinance, with reference to the electrical department. I never had any conversation with the director of public service about this ordinance, nor as to my duties under this ordinance of July 1, 1924. I had no conversation with the director of public service upon that subject:

Relative to who should give notices under Section 10 of the ordinance, there was one case where I asked the director to have the chief of police take up a matter with the foreman of The Cleveland & Southwestern Company on a line extension, and the chief of police went down there and notified them they would have to have a permit before they went ahead and did the work. That is the only one of my knowledge that I remember. That is the only matter that I ever took up with any director of public service. I never had any general instructions from the director of public service. My practice has been to just go ahead and execute the ordinance; that has been the practice there in Norwalk since the ordinance went into effect.

I don't recall ever having had any discussion with any mayor of the city about this ordinance. I never went before the council but was in council when some discussion came up wherein I explained some work, or something, I don't recall what that was.

I have seen Plaintiff's Exhibit No. 62 before. I don't recall of talking this over with the director of public service. I recall putting the letters on his desk for him to sign or to do with as he pleased. His office is downstairs in the same building, but I recall no conversation about it. I prepared Exhibit No. 62 myself, but do not remember whether I attended to the mailing of it. I probably caused Exhibit No. 62 to be mailed to the Local Telephone Company. I do not recall having

caused another paper like it to be mailed to the Ohio Electric Power Company. I do not want to say I did not. At the time I prepared Exhibit No. 62, I had made an investigation as to what wires were on the 21 poles, mentioned in it. I do not recall that I made any notation as to the number of poles which had Ohio Electric Power Company's wires on them. I think there were a couple of the 21 poles which did not have wires of Ohio Electric Power Company attached. I would not say that 19 of the poles did have Ohio Electric Power Company's wires on them. I do not know how many had.

I testified that there was an old style transformer that had been of the vintage of about 20 years ago, referring to Defendant's Exhibit N. That type of transformer was in general use by Ohio Electric Power Company in the majority of cases. They have other types of transformers, but this type was used in the majority of cases.

This is my signature on the letter designated Plaintiff's Exhibit No. 51.

I did not have specific authority to write the letter, but took it upon myself to use the language "I am authorized by the director of public service." When I wrote that letter, I had in mind the enforcement of the ordinance of July 1, 1924. The letter is dated May 14, 1925.

"The Court:

You do not claim, do you, Mr. Eversman, that the plaintiff here did not comply substantially with the provisions of that ordinance of July 1, 1924?

Mr. Eversman:

No, Your Honor, we do not claim that. Whatever there is in that, Mr. Boxell, you can just save yourself cross examination. As I recall it, with very, very minor exceptions, you complied in every way with every letter, the subject matter of which related to the ordinance of July 1st, 1924; and the defendant admits that.

Mr. Boxell:

That is right."

I affixed my signature to Plaintiff's Exhibit No. 62 and prepared the letter. It is correct that the practice was that I executed the ordinance, without consultation with the director of public service. After the issuance of the letter, July 30, 1927, Exhibit No. 62, I received no further instructions from Mr. Webster, director of public service, with reference to the situation in that letter. Whatever was done after that, I did on my own initiative and I received no order from Mr. Webster sub-

sequent to that time, recalling the instructions contained in Exhibit No. 62. I testified that there are numerous places where lines of the city are on lines of the Ohio Electric Power Company and lines of the last named company are on city poles, and it is true that there are numerous places in the city where the same line of poles, for some distances, will support lines of both the city and Power Company.

In October, 1927, before the day the poles, which I have testified to, were removed, I marked 10 poles and took down ten, 9 or 10.

In Plaintiff's Exhibit No. 62, I mention authorization for the removal of 21 poles, but I did not undertake the removal of all the 21 poles mentioned in this letter. The 9 or 10 poles, which were removed, had Ohio Electric Company's wires attached to them. They strung their wires on them, but I believe there were two of them that had no wires on at all, not even a contact. Seven or eight were in use by the Ohio Electric Power Company. These 9 or 10 poles were vacant, in reference to the telephone company. They bore no lines of the telephone company. The telephone company put their telephone wires in conduits on the other side of the street. At the time I removed the poles, about 8 of them bore lines of the Ohio Electric Power Company, and two were vacant. Some weeks before the removal of the poles, I had a talk with the superintendent of the telephone company, but had no similar talk with anyone representing the Ohio Electric Power Company, prior to the taking down of the poles, but prior to that time I knew that these poles had on them lines of the Power Company.

My usual time for having men report for work was seven to seven-thirty o'clock in the morning. The reason for calling the men together at four o'clock was because I heard rumors through employees that the telephone company was going to patrol that line and make trouble, if we went to remove those dangerous poles. The other reason was that I had a lot of work on hand and I could not go into it in the middle of the day. It would hinder our other work. This job required two or three hours' work. The men who took down the poles quit at the same time in the evening. No transformers of the Ohio Electric Power Company to my knowledge were removed. It is possible that some may have been removed that I did not know about. No transformers were on any of the poles that I had taken down. The Ohio Electric Power Company probably had two or three transformers in that area. I hardly think that one

transformer was taken down that I did not know about, but it is possible, of course. A number of the wires of the Ohio Electric Power Company on the poles, which were taken down, were on cross-arms and the cross-arms were attached to the poles which I took down. The cross-arms remained suspended in the air attached to the wires.

In the several letters, sent by me to the Ohio Electric Power Company, possibly I made some statements that were untrue and there is no question in my mind but what some of those letters, where I stated I was authorized by the director of public service, were not specifically authorized by him, and that I was not authorized by him to bring the matters to their attention. That would be untrue. I talked with the director of public service about some of the letters. As to my statements in Plaintiff's Exhibit No. 63 being true or untrue, I do not remember one way or the other on it. The director of public safety and service may have specifically authorized me to write Plaintiff's Exhibit No. 63. I do not remember whether the statement contained in Plaintiff's Exhibit No. 66, that the director of public service and safety had authorized me to do certain things, is true or untrue. I may have had the specific authorization of the director of public service and safety to write that letter. That is so, with reference to all the letters, in which I made the same statement. I can not state whether or not I was authorized in any particular letter. It is possible that in the case of every one of these letters, wherein I make the statement that I had the specific authorization of the director of public service, that I may have had his authorization. At least, as to some of those letters, I was not authorized and as to some of them I was authorized, I can not tell which, that is, the execution of the letters. I was not authorized by him to execute or to carry out the provisions of any of them. I do not recall of the director of public service and safety ever withdrawing his authorization after the date of the particular letter.

In connection with the examination of Mr. Irvin, the photographs, Exhibits K, L, M, N, and O, were offered in evidence by the defendant.

"Mr. Welles:

We object to each separately, if Your Honor please, on the ground that it is of no importance whether there are isolated instances in which the poles or wires of the company need attention or correction; and that the evidence has no bearing upon the rights of this plaintiff. If

it shows anything it merely shows that Mr. Irvin had not performed his duty in requiring the operating company to correct conditions."

Thereupon, the following statement was made by the court:

"The Court:

As to Exhibit M, Mr. Welles, he testified that the transformer shown in that photograph is in general use by this company; and that it is a very antiquated style of transformer. It has some bearing upon the case. The others will be received merely for illustrative purposes. It is not of any moment except to illustrate the testimony. But Exhibit M is admitted generally, over an exception noted; K, L, N, and O are admitted merely to illustrate the testimony of the witness.

"Mr. Welles:

Note our exception.

"Mr. Eversman:

We are calling, Mr. Irvin, Your Honor, to testify on another matter.

"The Court:

All right."

TESTIMONY OF M. G. IRVIN
(continued)

DIRECT EXAMINATION

By Mr. Eversman:

Prior to my seven years' service as superintendent of electric light and water department of the City of Norwalk, I was employed by Henry L. Doherty Company in their Ohio Public Service property at Elyria, for about 7 years. The last four years of my service, I was superintendent of transmission and distribution, and for the first three years I was chief electrician. Prior to my employment with the Doherty Company, I was employed by The Willys-Overland factory in Elyria as first electrician; and prior to that I was with The Cleveland & Southwestern Railway Company as electrician; and prior to that I was an electrician for Carnegie Steel Company at Newcastle, Pa.; and prior to my employment with Carnegie Steel Company I was in the electric contracting and house wiring business at Point Marion, Pa. Prior to that time, I was at Elyria as factory electrician for Dean Electric Company. Dean Electric Company was engaged in manufacturing telephones, switchboards, automobile horns and ignition systems. I have

been engaged practically all my working life in the electrical business.

"The Court:

Is this witness going to fix values?

Mr. Eversman:

Yes, Your Honor.

Q. Give us a general description of the generating plant of the City of Norwalk?

Mr. Welles:

Objection, on the ground that what he says is there has no bearing upon any issue in this case.

The Court:

I think that is so, Mr. Eversman, is it not? There is no issue in this case which requires the court to compare the two systems in any respect that I can see.

Mr. Eversman:

The bearing it has in this case, I think, is this, if Your Honor please, that the claim may be made—and there is certainly the statement in the petition, in the bill—that the plaintiff here, that is, Ohio Electric Power Company, has property here of considerable value; and I think the petition states what the property is worth; and that if they are ousted from the streets of Norwalk, they will suffer great injury.

The Court:

Practically wipe out any value it might have.

Mr. Eversman:

Yes; and the purpose of this is to show, in the first place, if they have any franchise at all, which of course we deny, the franchise is not an exclusive one; and that the plant of the city is very much larger than this Ohio Electric plant, and serves substantially all of the people, and can serve those that are now being served by the Ohio Electric.

The Court:

I do not think it is necessary for you to go into that in any way I can see. We can assume that is all so. They have four hundred and some customers.

Mr. Eversman:

The fact of competition certainly has some bearing upon value, if that becomes an issue in this case.

The Court:

I do not see that.

Mr. Eversman:

If the question of value were not an issue in this case, then I would say this line of evidence is entirely immaterial. Personally I don't think it has anything to do with the case. We have not brought it into the

case. The plaintiff brought into the case the value of their plant.

The Court:

If there is anything in what you say, it is so remote, it is unimportant. The question is the value of this plant.

Mr. Eversman:

I don't think that is in issue in this case, the value of this plant.

The Court:

It certainly is in issue on the amount in controversy. Do you claim anything further for your testimony as to the value of your plant?

Mr. Welles:

The evidence establishes the amount in controversy; establishes, of course, that there will be a loss of security to the plaintiff bankers under the trust if the value of the plant is destroyed.

The Court:

Do you claim anything further for it than that?

Mr. Welles:

No, Your Honor.

Mr. Eversman:

Then he does say it has a bearing on the value of the bonds.

Mr. Welles:

It has a bearing upon the question whether our security for the bonds is affected or not by what the city is proposing to do.

The Court:

You have got, first, the value of the plant. The next step is of course the value to the mortgagee here as security.

Mr. Eversman:

If this court is interested in the determination of the value—we are talking value now—if that is in issue in this case, then certainly the kind of competition this plant has is a material factor in determining value.

The Court:

Well, it is so remote, if that is all Mr. Welles claims for his testimony, there is no point in going into it that I can see. Your plant might burn down tonight.

Mr. Eversman:

I assure Your Honor that we have insurance.

The Court:

Mr. Welles' position now is that the matter of value of this plant has been gone into only for the purposes of establishing the jurisdiction of this court.

Mr. Eversman:

If that is so, if that is the construction of it, I am now satisfied.

The Court:

That is so, Mr. Welles, is it not?

Mr. Welles:

I think it is competent for jurisdiction; it also goes to the question as to the right to equitable relief.

The Court:

What do you mean by that?

Mr. Welles:

We are threatened with a loss of part of our security.

The Court:

That is still a matter of jurisdiction. That is all that is claimed for it."

Ohio Electric Power Company has 410 poles in the City of Norwalk and 400 customers. The kilowatt capacity of the Ohio Electric plant is 200 kilowatts, and the present demand is about 160. I have made an inspection of the Ohio Electric plant for the purpose of determining the cost of reproduction new and the cost of reproduction less depreciation of that plant, and have prepared an exhibit of my estimate.

"Mr. Welles:

I may say that we object to any opinion by Mr. Irvin on this subject, on the ground that he has not shown himself qualified.

"Mr. Eversman:

I think he is qualified.

"The Court:

I am not saying he is not. The evidence shows he has been in the electrical business a long time. He may not know a thing about value."

I am familiar with the cost of all items of property that go into a generating and distribution system of an electric plant and with the elements of cost that go into a transmission system.

As superintendent of the light company in Norwalk, I purchase all material for them, and in connection with that work it is necessary for me to keep informed from day to day as to the values of items of property that go into an electric distribution plant, and I am so informed.

The Public Utilities Commission of Ohio made an inventory of the Norwalk city plant and I assisted them in so doing.

"The Court:

Do you care to cross examine him, Mr. Welles, on

this point? He shows prima facie, some knowledge of values.

"Mr. Welles:

No cross examination on that subject.

The Court:

All right. You are reserving your right to later.

"Mr. Welles:

We still make the objection that he is not qualified.

"The Court:

He has shown some qualification.

"Mr. Welles:

Exception."

Exhibit P is a tabulation showing reproduction cost and reproduction less depreciation and was prepared by me.

"Q. What did you find the cost of reproduction new of the plant of the Ohio Electric Power Company in Norwalk to be? A. $17,905.60.

"Mr. Welles:

Objection, on the ground previously stated.

"The Court:

All right. It is overruled. Save your exception.

"Mr. Welles:

Exception."

That is cost of reproduction less depreciation.

"Q. And what is the cost of reproduction new of this plant?

Mr. Welles:

The same objection.

The Court:

Overruled. Save your exception.

Mr. Welles:

Exception.

Witness:

There are different percentages of depreciation. I will have to total that.

Q. It is given just above there, is it not (referring to exhibit)? A. $34,027 plus $500 for land."

In this Exhibit P, there is no inventory of transmission line, and I did not attempt to evaluate it. The towns and villages, other than Norwalk, supplied by this transmission line, are Birmingham, Kipton, Florence, Henrietta, East Norwalk, and a rural line called The Farmers Mutual Light & Power out of Milan, which covers territory from Berlinville, possibly seven miles in length.

The percentage of the total load carried by this transmission line for the load of the City of Norwalk

is 50%, that is 50% of the load on the transmission line supplies Norwalk; 50% goes into these other towns.

Twenty-five or thirty customers of the Ohio Electric Power Company are served with a three-wire single-phase service, and the same number, 25 or 30 of its customers, are supplied with a three-wire, three-phase service, and the balance of the customers are two-wire, single-phase service, commonly called 5-ampere service.

CROSS EXAMINATION

By Mr. Welles:

In ascertaining how much of the load of this transmission line is used for Norwalk and how much for other purposes, it is a matter of estimation over my experience of the type of customers served on both lines, both sections of the line. It is an estimate. I assumed that there are 400 total customers, power or residence customers. I do not know how many customers were on the line outside of Norwalk. I never had an exact figure on that. I have a fairly good estimate based upon the number of customers they have. I do not know how many customers they have to base an estimate upon. Birmingham has a certain population. I do not know how many customers this company has outside of Norwalk served by this transmission line. I have taken the populations of towns and there is some ratio of customers to populations. I don't remember how many customers I estimated there were in the country. At the time I made that estimate, I took the populations of the territories served and used the diversity factor—that is common practice—and arrived at the number of customers. I made that estimate at the time I made an appraisal for this valuation of the other property in 1927. I have recently gone over the subject in the city, but not on their transmission line. They could not have increased what they have out along the transmission line very much. I do not know whether it is diminished or not. They have four power customers in Birmingham, a couple in Kipton and as compared to power customers in Norwalk their demands are very low. I am not in position to deny that there are twice as many customers in Norwalk as there are long the rest of the line. There are more power customers in Norwalk than there are in any place else on the line all combined, and having a larger demand, larger industry.

I would not regard the month of December as a fairly typical month in the use of electricity; October or

April are typical months for the year, to use as an average for the year. December would be a heavy month, but not necessarily for both light and power. Many factories close near Christmas for two weeks' inventory. If it appeared that the total consumption of power in the Norwalk district, consisting of Norwalk, Kipton, Birmingham and Vermilion, to the Mutual Light & Power Company, and to the Wakeman —— Electric Company, in December, 1929, was 68,024 kilowatt hours, and in Norwalk alone, during the same month, it was 45,518 hours, you could hardly tell whether that was a normal condition or not. If you take a year's figures and average it up, you might find that the condition would be different. I would not want to change my estimate of 50% just based on that. It would not be enough for me. Ordinarily, the power demand is greater in Norwalk, proportionately, than along the line. The 68,000 total included Norwalk. If I had the figures, I probably could figure out the exact percentages. I do not claim I had the data and I did not have any figures from which I could make any accurate determination as to how much was used in Norwalk and how much used outside. I used 80% depreciation on the brick building. I used that percentage of depreciation, because the building was built in 1895 and has not been maintained. I thought it was a very conservative estimate. The appearance of that building, or the sale price of that building, as it is right now, is zero. I have never had anything to do with the purchase and sale of brick buildings of that character, but I have built brick buildings. I have not had occasion to appraise a plant for a prospective purchaser. Two per cent a year of depreciation is what I use on our plants that I have charge of. I would not say that that would be usual. The percentage of depreciation ordinarily used in determining the value of engines, boilers, generators, regulators and transformers is six to eight per cent a year.

I said the building and equipment is depreciated 80%. If an equipment is in operation, it has a value in operation and you could not depreciate it 100%; it was worth nothing removed from the foundation or from the building, only scrap value, which would be absorbed in removing it. I followed the method I have always used in my own work, which I would use if I were manager of that property and was making a valuation of it for sale or for figuring the return on the investment. I used my own individual method for applying depreciation. I do not know what the accepted rule would be on property

in that condition and I have not used any accepted rule. As to the cost of a 150-horsepower Sterling boiler, new, at this time, I have data on that. I purchased a 511-horsepower boiler three years ago, and had data in my office covering the cost of the different sizes of boilers of that type. I got that data from manufacturers of boilers: The Union Iron Works; Casey-Hedges Company; Erie City Iron Works, and Babcock & Wilcox. I had a quotation for a 150-horsepower Sterling boiler, a three-drum, vertical tube boiler, at $8,000.00 That figure was put out by the Babcock & Wilcox Company, the manufacturers of boilers. I was installing a 511-horsepower boiler. When getting information with reference to new installations and arriving at what size boiler is necessary for a particular use, you get prices on the different sizes, and the different types of construction, and apply the type of equipment consistent with the money you have available for your company. I did not ask them for a quotation on a 150-horsepower boiler, but they certainly gave it to us. I do not have it with me, but possibly could get it and produce it.

In referring to my memorandum, Exhibit P, and to the item "Generating Station Equipment," I did not obtain quotations from the manufacturers for each one of the items of equipment there listed. We have a price on transformers but no other items. I estimated the price on the equipment. I estimated what a manufacturer would charge for them, without making any effort to find out whether that is the price at which they are quoted. I did not include anywhere in my valuation figures anything for the cost of obtaining customers.

Ohio Electric Power Company has upwards of 400 customers, and it is a fair thing, in undertaking to evaluate an electric light and power plant, to allow something for the cost of obtaining the number of customers that it has. There are other items of going concern value besides the cost of obtaining customers that I have not included in my evaluation. There are engineering items and items of that nature, interest on the investment while under construction, and these things are omitted from my values. I did not ascertain the age of each item under "Generating Station Equipment." The voltage regulators were installed since I was in Norwalk, and that is probably the only item that I actually know the age of.

RE-DIRECT EXAMINATION

By Mr. Eversman:

I was here when Mr. Insull testified that the boiler and the engine were installed in 1895. In making up this exhibit, I got my original figures in a valuation I made in 1927, covering the equipment and material and all that; then the other day, Saturday, I revised it to a certain extent, using Mr. Insull's figures, in reference to pole line miles of primary and secondary, and checked that, Saturday, with actual conditions. I, also, estimated from looking at the building that it was a 100 by 50 by 16 feet in size; and in that way I arrived at the figures with the revised estimate I have made. I, also, took into consideration the age, which Mr. Insull gave of the equipment, which was in accordance with information I had had from the employees of the company in 1927. It all lined up; his information on age lined up with what I had originally taken.

RE-CROSS EXAMINATION

By Mr. Welles:

I do not know whether my original estimate, the one I made before I revised it last week, is here or whether it is in Norwalk.

Thereupon defendant called as a witness in its behalf

WARREN D. SPENGLER,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Eversman:

I live at Hudson, Ohio, and my present employment is with The H. K. Ferguson Company, of Cleveland, engaged in a line of business as engineers and builders of industrial properties, including power plants and so forth. For the last 30 years I have been in engineering, general engineering; and have designed and built a number of transmission lines, varying in voltage and electrical distribution from 2300 to 130,000 volts. The power plants, practically all of them, were larger than this one here at Norwalk. I am thoroughly familiar with power plant construction and power plant operating cost. I am a graduate of the Massachusetts Institute of Technology and received my engineering education there. I have been in the employ of The H. K. Ferguson Company six months. H. K. Ferguson and my own organization, which was in existence for 11 years, merged; so it has been only six months that I have been identified with the Ferguson Company. I had an organization of my own, operating under my own name, an incorporated company. It was in business 11 years. We sold out entirely to H. K. Ferguson last May and I joined his organization. When I was engaged with my own firm, the business was just exactly the same, electric power plants and transmission lines for utilities and for industrial plants. From time to time I have installed power and light plants, electrical distribution plants, and I am familiar with the cost of reproducing electrical plants and plants of the character of the one in Norwalk. Last Saturday I made an inspection of the property of the Ohio Electric Power Company in Norwalk. We passed through the town on the various streets looking at the distribution lines in the town, observed the condition, the type of construction, the apparent age of the equipment and material; and, also, a brief inspection of the power plant. We traveled along the line of the transmission, where it was possible to do so along the highway. We started from Norwalk and ended at Oberlin, a distance of about 25 miles. We started in the morning, shortly before noon, and it was half past four or five when we finished, prac-

tically a day. I made an estimate of the cost of reproduction new, and the cost of reproduction less depreciation of a part of the plant of the Ohio Electric Power Company, the distribution plant in Norwalk and the transmission system. I only made two estimates, one for the transmission between Oberlin and Norwalk, and the other for the power plant. I did not have the time to do more than that. I reduced that estimate to writing and this, Exhibit Q, is a copy of it.

"The Court:

Are you marking the sheets separately or all together?

The Clerk:

All together.

Mr. Eversman:

Exhibit Q, consisting of two pages, I suppose.

The Court:

All right."

In arriving at the cost of reproduction new of the transmission line, I will say we built a line several years ago, 22,000-volt, three-phase, on 35-foot poles, with spans that were 200 instead of 300 feet, No. 4 copper. I corrected for the price of copper on the basis of the time that was built, and, as I recall it, the cost was $1850 a mile. With the present cost of copper now, that price is too high. It could be built at considerably less. I put that in there at $2000, to cover easements on private right of way, which is ample. I arrived at the item of $5540.00 for a substation on the original report of Mr. Insull.

The Exhibit D is the report of Mr. Insull, to which I refer. With reference to my figures of $19,250.00 for the generating station, I went to my own records of power plant costs, and built up a total cost of a plant that would consist of a 200-kilowatt generator, and a 150-horsepower boiler, a switchboard similar to the one there, with a stack, etc., and building, and arrived at $19,250.00.

In respect to the next item of $30,154.00, under the heading "Distribution," I left that just as it is, I had no time to make any estimate of that. I would say that that figure is amply high.

As to the items of property listed under "Miscellaneous" at $4800.00, I left that as it was, the same as Mr. Insull's figure. That is, on the substation, I accepted Mr. Insull's figures.

"Q. I take it, then, from this Exhibit Q, that you found the cost of reproduction new to be $109,744.00,

basing the estimate, in parts, as you have testified, on Mr. Insull's figures? A. I observe an omission there, in that generating station. That $19,250.00 was the cost of the equipment. There was an addition to that. That is my error there. There should be an addition to that. That should be $33,800.00. That is a typographical error there. That $19,250.00 should be $33,800.00.

"The Court:

The $19,250.00 should be $33,800.00, is that right?

"The Witness:

Yes, sir, that is right.

"Mr. Eversman:

The $19,250.00 should be how much?

"The Witness:

$33,800.00. I will tell you how that is made up. The $19,250.00, if you take Mr. Insull's report on page 4, covers the equipment; and then the building, I have allowed reproduction new at $12,300.00, wiring at $750.00, which is Mr. Insull's figure, and land at $1500.00, which is his figure, that brings the total to $33,800.00. There was an omission there on my part.

"Mr. Welles:

That changes the total how much then?

"The Witness:

I will tell you in a second. $14,550.00 more makes a total of $124,294.00."

In Exhibit Q, I have depreciated the transmission lines 75% and arrived at those figures by inspection. The condition of the actual poles themselves is very, very poor. A great deal of the line should be repaired, if it is going to last much longer; and a great deal of it has been repaired and is in need of further repair. I examined a number of stub posts that supported the original poles. They are in bad shape; and the poles themselves, those that have not been repaired or supported, are in pretty bad shape. There are a number of new poles, and it is just a question, in a hurried inspection, about what kind of a judgment to make regarding a situation of that kind. An accurate estimation would probably bring that below 25% as to actual reproduction new, less depreciation.

I depreciated the substation 85%, exactly as it was in the original report, Exhibit D, I think you mentioned. I depreciated it but 15% and have not modified that figure at all. I did not have an opportunity to inspect the substation and for that reason adopted Mr. Insull's figures. As to the generating station, I placed the building at $1,000, and the land at $1500, which was the orig-

inal figure, and nothing for the equipment. The building is in very bad repair, very poor condition. The value of the land is exactly as it was in the original estimate, and I made no investigation as to it. I arrived at the total depreciation of equipment, because the plant, as I understand, is 35 years old, and not worth anything due to obsolescence and depreciation. I made a personal inspection of equipment and took its value on the basis of the cost of reproduction, less depreciation. The generating station is antique; it has outlived its usefulness; I would hesitate to recommend any client of mine to spend any money on it.

In arriving at my depreciation of 50% on distribution, I made an inspection, noting the new poles, the old poles, and the size of the old poles, the condition of the wiring, and the overhead construction, and would say that 50% is plenty high enough for a percentage of the cost of reproduction new.

The miscellaneous item, cost of reproduction new, less depreciation, $3,125.00, is exactly as it appears in the original report. I made no inspection of those items. Were I called on, as a consulting engineer, to place a value on this property, for the purpose of its purchase by a client of mine, in addition to the reproduction cost, less depreciation, I would take into account its ability to earn money on a given investment. That would depend upon the customers, the rates, the gross returns, the operating expenses; and that would determine the amount that could be paid for a property of that kind. I observe that in Mr. Insull's estimate, he places the cost of reproduction new of the plant at $164,000.00.

"Q. If the kilowatt demand of a generating distribution plant were 160 kilowatts, and the total cost of installing such plant new were $164,000.00, what, if any, comment have you to make as to the relationship of the cost with the demand?

Mr. Welles:

Objection, if the court please, on the ground that it does not lie in the mouth of the city, which for years past has prevented this company from developing its plant, extending its line, acquiring new customers, now to say because they have by that means brought about this disproportion between the amount of the demand and the capacity of the plant to serve, that by so depreciating the value from that standpoint, they can bolster up their own rights as against this mortgage holder.

The Court:

Well, it does not get very far. We will let him answer it.

Mr. Welles:

Note an exception.

The Witness:

The investment is entirely too large for the work it has to do in supplying 160 kilowatts. That is at the rate of $1000 per kilowatt, practically; that is a great deal too much.

Q. What is the average relationship between kilowatt demand and cost new?

Mr. Welles:

The same objection and exception.

The Witness:

The usual cost as averaged will vary around $300.00 a kilowatt; sometimes lower than that; sometimes more than that, but not very much for a successful plant.

Q. From your inspection of this property, both the property in Norwalk and the transmission lines, are you able to determine from that inspection whether or not this property has been normally maintained?

Mr. Welles:

The same objection.

The Court:

Overruled.

Mr. Welles:

Note an exception.

A. I would say that the property has been very poorly maintained."

I arrived at the conclusion that the property has been very poorly maintained by an inspection of both facilities, the facilities of the town, the municipal plant, and the Ohio Electric Power Company facilities. There is no difficulty at all in picking out the Ohio Electric Power Company lines, with very few exceptions, where they have put in new poles; but the balance of the equipment is in very poor repair.

CROSS EXAMINATION

By Mr. Welles:

In determining the reproduction cost new, I assumed a building of the same cubic content, as those which are there. I assumed a building of the same identical size, at 15c per cubic foot. I have had experience as an operator of an electric light and power plant about 15 to 18 years ago as acting chief engineer of three different

properties at one time. In that position, the systems which I had charge of did not have their main source of power from other than their own plants. We were supplying power in that particular case. I understand the reason that the steam power plant is at Norwalk is to carry the load; that whenever they have an interruption in the transmission lines, the conclusion is it has to. It should have the ability to do so. If you have a 160-kilowatt load as a maximum demand, and you have a 200-kilowatt engine, it should be able to carry the load, but whether it does or not is a question of who you have as an operator. The equipment in its present condition will carry the load; whether it will be successful, whether it will be subject to interruptions due to a breakdown, or lack of repair, I can not answer; but it should, based on electrical capacity, be able to carry it.

"Q. From the standpoint of an operating man is it your opinion that a plant which is capable of carrying the entire load of the system in Norwalk upon occasions when its usual source of supply gives out is of no value at all? A. You are talking about a different value. We have been talking about reproduction costs, less depreciation.

"Q. I am asking you this question, if you will just listen to it and answer it.

(Question read.)

"The Witness:

Will you tell me what you mean by value?

"Q. Worthless. A. I don't understand what you mean by value.

"Q. I am talking about dollars and cents. Is it worth no dollars and cents? A. Do you mean can it earn its way?

"Q. I did not ask you that. A. That is dollars and cents.

"Q. I asked you whether it is of no value—something that should be wrecked and thrown away under the circumstances? A. I cannot understand your term of value. If you will define that, then—

"Q. You cannot answer the question as I put it? A. Unless you definie what you mean by value.

"Q. I define value by dollars and cents. A. I would say this: A dollar and cent definition of value is how much can it earn; and if it enables you to supply your customers and keep service there, then it is worth something; but how much it is worth depends upon how much it will earn.

"Q. Whatever your views about that may be, then

you will agree, will you not, that, to the Ohio Electric Power Company, or to one holding the mortgage upon the assets of the Ohio Electric Power Company, the plant and equipment, generating plant and generating equipment in it, are of value? A. They may be less than any value for this reason.

"Q. They may be less than any value? A. For this reason: It may be costing you money to keep that plant there; and you may be able to get the same service by connection through the city for less cost.

"Q. Let us put it this way: This plant which you say is capable of carrying the entire load, and which is used to carry the entire load from time to time, is in your opinion actually worth less than nothing to the owning company? A. I did not say it was; I said it might be.

"Q. I am not asking you to deal with possibilities; I am asking you to take the situation as it is there and give us your honest opinion as to whether this company *has an asset in that* equipment, generating equipment, in that building? A. I cannot tell you until I made a critical examination of how much it costs to operate that plant and how much you could buy your emergency power for from another source.

"Q. In brief, then, you do not know? A. No, sir, I do not know."

The value of the brick building less deprecation, I place at $1,000, and the value of the building to reproduce new now would be $12,300.00. I did not examine the foundation of the building. I observed the thickness of the walls of the building; they are 13 inches to 17 inches, 17½, the usual thickness; they are pretty heavily built walls. It is a one-story building. I do not know how long the walls and foundations will last and did not determine whether they would remain intact for a number of years to come. I have no opinion on that. It may last 50 years yet for what I can tell. The roof needed some repairing. I would not allow anything for it. It is practically gone. I did not estimate the cost of a new roof for a new building. The cost new of the building I estimate at 15c per cubic foot. I know what the cost of a roof new for the building would be, but have not got the data here to tell you. In estimating the cost of this building at 15c per cubic foot, it is ample. If you will give me a chance, I will give you the cost of a new roof on the building—whether it will cost more to put a roof on an old building or a new one depends upon what you would have to do. If you have to build

supporting members of the roof as well as renew the roof deck, it would be quite a job. You would have to renew a part of the supporting members of the roof on the present building. I cannot tell from a general inspection, but part of it has to be removed and renewed. If I were going to do the job, I would know what part, but do not know the percentage. If there were a new roof on that building, you would have a building there that would be capable of housing the equipment satisfactorily for quite a long time. I cannot tell you how much would have to be repaired, but probably a detailed inspection would show that you would have to remove the whole roof deck. I did not make such inspection. The building, with its present roof, is now housing the equipment, which is there and is keeping it, so far as the building is concerned, in condition so that it can be and is used. I am not in position to say that that roof could not be repaired for as little as $500. It is my opinion it could not be done for $500. I am in position to say that I would not take a contract to repair that roof for $500 and do a satisfactory job. I am handling a great deal of roofing all the time, but am not a roofing contractor. I am buying that kind of service. I have no means of knowing what it would cost to repair the present roof in the places where it needs repair.

I estimate the cost of a new roof on the power house building at about $2500, that is, a complete new deck and roof covering, a built-up roof, similar to what we use on buildings of this type, both for utilities and industrial plants, with roofing material similar to what you use on buildings of this type, a built-up roof, like those manufactured by The Carey Company and The Johns-Manville Company. There is now a slate roof covering on the building. I did not ascertain how the cost of producing electric current by means of the generating equipment now in the power plant at Norwalk compares with the cost in other stations, such as I might regard as having more modern equipment. I have no data of that kind furnished. The fact as to whether the power generating plant is in continuous use, or only in occasional use, does not strictly have any bearing upon the amount it depreciates. When you talk about the actual deterioration in its condition, you bring in the idea of maintenance. If you assume that it is maintained in condition, so that it can be and is used from time to time, but is not kept in continuous use, there might be a little higher maintenance—very, very small—if it is used all of the time, than if it is not used all of the time. A

power plant such as this would have to be out of commission occasionally for renewal, maintenance, because there is only one piece of equipment of each kind. As to the generator; if such a generator as that had been in constant use since 1895, there would be some difference in its present value than if it had been only in occasional use after 1915. It depends upon how that plant is kept. If the plant is kept free from dampness and moisture, so that the windings are kept dry, as it would be in the case of constant use, then there would be no difference. Generating equipment, which is maintained, so that it does efficiently produce power, may become worthless, before it is useless. I am using "worthless" in the sense of its ability to earn. In giving my opinion that the equipment in the power house should be given no value, I arrived at it this way: That from an accounting practice, it would have been depreciated to depreciation obsolescence years ago. It still may be useful and may earn, but whether it earns as much for the company as a different arrangement could earn is a question in my mind. In giving it no value, I am treating it from an accounting standpoint. As to whether it has an earning power or an actual value to the company, which it had, I would not want to make a statement regarding that unless I had more opportunity to explain what I mean. As to whether it has no earning power or that it was of no actual value to the company that owned it, I think I have answered that, as an accounting proposition, but not as an operating proposition. An expert accountant, who had never seen a power plant, could have testified from the same standpoint as I have testified, as to the lack of value of that power plant.

As to the high tension transmission line, I arrived at a value of $2,000 per mile and I say that that would be an ample cost of reproduction. I do not base it upon the present price of copper, but I base it upon a similar line which we built within the last few years, with the price of copper about 4c higher per pound than it is now. I did not say, in answer to a question as to the valuation, that it was at present prices, but at the price that we built the line for originally. I said, in my direct examination, that taking into consideration present prices it would be somewhat less than $2,000. The line I built was in Ashtabula County, Ohio. It was a line I would say, a little better built; the poles were larger, larger tops; very good, husky construction. I think there were about 22 miles, but not the same size wire. I made an

allowance for the wire, which was No. 4, and which I changed to equal No. 2 wire, on the basis of the old prices. The figure of $19,250.00, which I used for the reproduction cost new of the 200-kilowatt engine generator unit with exciter, switchboard, boiler and stack, was from my own records of that same capacity of plant. I can give a list of that, unit costs. That was construction; the purchases are only part of it. That is the actual construction cost, the complete plant ready to operate; purchases only give you part of the cost. I had to make up a plant of 200-kilowatt capacity with a 150-horsepower boiler. I did not have any single plant exactly like that, but I can give you the exact figures upon which that was based. I based it upon figures from my own office records, partly purchases, partly labor costs, etc. I do not have the data here to break down the cost of wire, cost of poles and the labor on the transmission line, but I took the total cost, $1819.00, and revised it for the different size of copper. I called it $2000 per mile. The cost of transmission line erected was $1819, and I considered $2000 was liberal. The wire cost there will run around $500 a mile. This line had a ground wire in also, which you have not at present. It is better built line. It costs at least $500 a mile for the wire. It may be $550. I don't recall right now. I did not ascertain what the condition of the wire, which is up there, now is. I undertook to depreciate it 50%, but have given full credit for the wire. I have not depreciated the wire at all. I have taken the transmission line and depreciated it, wire and all, 75%. That is aluminum wire. Aluminum wire does depreciate due to vibration set up in the wire during wind storms. It is more liable to break down than copper. It crystallizes more readily. I said I had not depreciated wire at all, but have depreciated the whole line, including the wire, 75%. Those two things are not inconsistent. The wire is the principal value in the line, and is included in my valuation of $50.000.00. According to the figures we have here, $12,500 of the value of $50,000 is wire, $12,500 for the wire alone. I took the general construction of the line and made an estimate of about how much that would depreciate over that period, the total; and using about 2% for your 35 years, when a line is not maintained as that line shows it has not been maintained. 25% is about all you can allow for the value of the cost new, or a depreciation of 75%. I did not divide it up into wire, insulators, pins, poles, etc., because I did not have time. I did not depreciate the wire, because I did

not break it up, but I have $12,500 for wire. I did not take into consideration any depreciation of wire separately in determining the present value less depreciation of the line. According to this figure of $500 a mile for wire, which I said was approximate, I said $500 was an estimate, I say that you would have to assume that I took no depreciation of wire into consideration with $12,500 at the present value. The present value of the wire as allowed by me in my grand total of the line is $12,500. That is the value of the wire, so that I allow no value for poles, substations, brackets or cross-arms, or anything else.

RE-DIRECT EXAMINATION

By Mr. Eversman:

In my figure of $33,800.00 on Exhibit Q, this consists of four figures; $19,250 for the cost new of the engine and generator units; $750 for wiring; $1,500 for land; and $12,300 for the building new, making a total of $33,800.

Thereupon the defendant offered in evidence Exhibits P and Q, P being an exhibit of the cost of reproduction less depreciation of certain properties of Ohio Electric Power Company, at Norwalk, made by Mr. Irvin, and Exhibit Q a somewhat similar estimate made by Mr. Spengler.

"The Court:

Is there any objection?

Mr. Welles:

We object to each of them, separately, on the grounds that they have no tendency to disprove the plaintiff's right to maintain this suit; and the testimony of these witnesses shows that they were made up on a wholly inaccurate basis to determine values.

The Court:

They will be admitted in connection with the testimony of these two witnesses for whatever relevancy they may have. I will not determine that now. Save your exception.

Mr. Welles:

Note our exception."

Thereupon the defendant called as a witness in its behalf

B. F. PRESTON,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Craig:

My place of business is 325 East Main Street, Norwalk, Ohio. I am engaged in the telephone business as city foreman for The Northern Ohio Telephone Company and have been connected with telephone work in the City of Norwalk continuously around 34 years. I was employed by that company July 1, 1924, and was acquainted then with the various lines, transmission lines, telegraph lines, telephone lines, and any kind of lines that conducted electricity within the City of Norwalk and had a general knowledge of that situation, including telephone and telegraph lines. On July 1, 1924, the different companies having wire lines extending through the City of Norwalk were the American Telephone & Telegraph Company, The Ohio Bell Telephone Company, The Northern Ohio Telephone Company (it was then The Norwalk Telephone Company), the Ohio Electric Power Company, the municipal light plant, The Western Union Telegraph Company, the New York Central telegraph lines, the Wheeling telegraph lines, The Lake Shore Electric Railway Company, and I don't know whether The Cleveland & Southwestern was then there or not. The Sandusky, Norwalk & Mansfield Electric Railway Company, I believe, had power lines. All these companies had wire lines, to my knowledge, suspended on poles, some underground, but most of them were on poles then.

"The Court:

When was the municipal plant built over there, do you remember, the electric lighting plant? What is the date of that, Mr. Craig?

Witness:

I don't know just when it was erected.

Mr. Craig:

It was erected, I think, early in 1916, but did not go into operation—

The Court:

Until 1917?

Mr. Craig:

Until about the first of 1917. That is my recollection. Mr. Martin, who was mayor, tells me it was started in 1916, that is, the operation.''

CROSS EXAMINATION

By Mr. Welles:

On July 1, 1924, there were electric light and power wires belonging to the City of Norwalk up in the streets of that city and there were electric light and power wires of the Ohio Electric Power Company or its predecessor, whichever was then operating, also in the streets of Norwalk at that time. The Lake Shore Electric had its power wires in there, its trolley wires and its feeder for the trolley, but it did not have electric light and power wires to my knowledge. As far as I can remember, it is correct to say that the only electric light and power wires which were then in use in the city belonged either to the city or to The Cleveland & Southwestern—the predecessor of the Ohio Electric Power Company.

REBUTTAL

Thereupon, in rebuttal, plaintiff called as a witness in its behalf

L. B. FAUVER,

who, having heretofore been duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Welles:

I am the L. B. Fauver who testified in this case before. I became counsel for the Ohio Electric Power Company upon the date of its organization, I don't know what year, but it was sometime prior to the time that

that company acquired the Norwalk property. I made an investigation in the consideration of the question of the rights which the Ohio Electric Power Company acquired in the streets of Norwalk, in connection with the bond issue which the Ohio Electric Power Company put out. I recognize Exhibit No. 76 as a photostatic copy of an original letter written by me at or about its date, February 4, 1925. The original of that letter was mailed in due course to Seibert & Riggs, of New York City. At that time, Seibert & Riggs represented Messrs. Victor and Albert Emanuel, of the Ohio Electric Power Company, and, in a way, The Seaboard National Bank. I believe The Seaboard National Bank was a trustee under the mortgage securing the bonds of the Ohio Electric Power Company. In addition to sending this letter, Plaintiff's Exhibit No. 76, to Seibert & Riggs, and before February 4, 1925, I conferred with officials of the Ohio Electric Power Company and gave them oral opinions with respect to the Norwalk situation. I discussed the matter with Mr. Victor Emanuel, who, I think, was president of the Ohio Electric Power Company. I discussed the matter frequently with Mr. Loeb and Mr. Shaw, who were, also, executives of the Ohio Electric Power Company and, of course, discussed the matter with Mr. Seibert. That was before the acquisition of the Norwalk properties by the Ohio Electric Power Company.

"Mr. Eversman:

If Your Honor please, it seems to us that testimony of this particular kind is entirely immaterial and irrelevant. Here is a man who says he was attorney for the Ohio Electric Power Company, and is stating that he had certain discussions with certain officials of the company, apparently as to their rights. Any opinions he may have entertained as to the rights of the company are immaterial to the issues in the case.

Mr. Welles:

We expect to show, if Your Honor please, that the president of the Ohio Electric Power Company in turn gave an opinion in the form of a letter in writing to the bankers who underwrote the bond issue.

Mr. Eversman:

Even if that is so it is entirely immaterial.

The Court:

What you are trying to show is actual reliance upon the state of the law as it was at the time?

Mr. Welles:

Yes, Your Honor.

The Court:

Perhaps that may be presumed; but I do not see any harm in showing it to be a fact.

Mr. Eversman:

As I understand this testimony relates to an opinion Mr. Fauver may formerly have given.

The Court:

I suppose what they are attempting to show is that he advised them on the basis of the law as it existed at that time, and that there was actual reliance by the predecessor of the plaintiff or perhaps by the plaintiff that that was the law, is that not so, Mr. Welles?

Mr. Welles:

Yes, Your Honor. Four lines of this letter read as follows:

'While we enjoy no franchise from the City of Norwalk, still under the law of Ohio, we have a full right to continue our operations in the same manner and to the same extent as our predecessors have operated.'

Mr. Eversman:

It is entirely immaterial what this man's opinion may have been of the rights of the company.

The Court:

Of course, he can not bind the court by his opinion of the law, but I think they have a right to show that they bought the property on the assumption that that was correct. Now if that is not a correct statement of the law, it does not make any difference in the case.

Mr. Eversman:

That is just the point, Your Honor. It seems to me it is entirely immaterial.

The Court:

He wants to show reliance. I think that is relevant. Save your exception.

Mr. Eversman:

Exception.

Q. What, in substance, did you say to Mr. Emanuel and to Mr. Loeb, and to the other officers of the Ohio Electric Power Company at these interviews you mentioned on the subject of the rights which the Ohio Electric Power Company would have in the streets of Norwalk if it acquired the Cleveland & Southwestern properties?

Mr. Eversman:

We object, on the same ground.

The Court:

Overruled. Save your exception.

Mr. Eversman:

Exception.

A. I stated to them that there was no franchise from the City of Norwalk vesting any rights in this property. At that time it was owned by either the Ohio Electric Power Company or Victor Emanuel."

The date of that letter is February 4, 1925. I stated it was my judgment, based upon an examination of the law of the State of Ohio, that a company whose charter was issued to it prior, I think, to 1895, to operate a public utility, had the right to continue operating that utility in the community where it had built its plant and started its operations. I said to them that my opinion was somewhat based upon a very extended discussion of the matter indulged in by Mr. Craig, a copy of which I think I had furnished to me by The Cleveland, Southwestern & Columbus Railway Company. The Mr. Craig, to whom I refer, is the gentleman who sits at the trial table. I remember distinctly talking with Mr. Victor Emanuel over the long distance telephone—I can not give the date—but sometime prior to the time of the issuance of the bonds—and gave him the same opinion that I have just indicated. I remember, also, talking both personally—I think in New York and by telephone with Mr. Seibert at the time the bonds were about to be issued, about the right of this company to operate in the City of Norwalk; and stating positively that it was my judgment, under the laws of Ohio, the company's rights to operate in Norwalk had been fixed by the law of Ohio; and when it got its charter from the State of Ohio, under the law that then existed, it became vested with that right to continue operations in that city. I discussed with them whether this right was one at will or in perpetuity; and told them that, under the law of Ohio, as revealed by various Supreme Court decisions, this right was a perpetual right they had acquired when the charter was issued by the State of Ohio; and that no franchise rights were necessary from the City of Norwalk. And the Supreme Court decision has not changed my mind about it either.

"The Court:

Is there any Supreme Court decision you can point to that says this is a perpetual franchise?

A. Oh yes, plenty of them. I will be glad to argue it, Your Honor; especially the Wyandotte case. I think the law is absolute vesting in a company that got a franchise prior to 1895 the right to continue operating.

The Court:

You will have to omit one year on that, on any theory; that is, between 1886 and 1887.

Witness:

Yes. There was a certain lapse of time." As I recall the matter, Mr. Craig represented The Cleveland & Southwestern Railway Company, the owner of this property prior to the time it was transferred to Mr. Emanuel. I secured Mr. Craig's opinion, Plaintiff's Exhibit No. 77, I think, from The Cleveland & Southwestern on or about the time they transferred the property to Mr. Emanuel. Before that opinion was delivered to me, I believe the Southwestern secured Mr. Craig's consent to its being turned over to me. If I am wrong, he will correct me. This letter, Exhibit No. 77, dated September 29, 1927, is addressed to Mr. Frank H. Ginn, Williamson Building, Cleveland, Ohio. At that time, Tolles, Hogsett, Ginn & Morley were general counsel for The Cleveland & Southwestern Railway Company.

No cross examination.

Thereupon, plaintiff offered in evidence Plaintiff's Exhibits Nos. 76 and 77.

"Mr. Eversman:

We object to the introduction of Exhibits 76 and 77 on the ground that they are irrelevant and immaterial.

The Court:

Do you think Mr. Craig's opinion relevant here for any purpose?

Mr. Welles:

Yes, Your Honor, on this theory; in some of the cases, as we read them, we find comment made by the courts to the effect that the operating company has at all times maintained the position that in a particular case it had certain rights; and particularly in view of the fact that some claim is made here that this company applied for a franchise at one time, we think it is important to show that it at all times thought it had a franchise from the state already.

The Court:

I will admit 76 at this time. I am in doubt about 77. I will hold that at this time. I am glad to have Mr. Craig's opinion."

Thereupon, in rebuttal, the plaintiff called as a witness in its behalf

LELAND E. YEAGER,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Welles:

My residence is 32 Edgewood Drive, Scarsdale, New York. I am and have been, since August 1, 1923, associated with A. C. Allyn & Company, Inc., investment bankers, whose business is the purchasing and distributing of investment securities. I personally had to do with a transaction or transactions, by which A. C. Allyn & Company purchased certain bonds issued by the Ohio Electric Power Company, when the company was formed, I believe, in 1924, and subsequently.

"Q. Did you have to do with the transaction by which an aggregate amount of $949,000 of first mortgage 6½% bonds were acquired by A. C. Allyn & Company, Inc., from the Ohio Electric Power Company, and offered by A. C. Allyn & Company to the public?

Mr. Eversman:

Objection.

The Court:

What is the amount?

Mr. Welles:

$949,000.

Mr. Eversman:

As being irrelevant and immaterial.

The Court:

Why, Mr. Eversman?

Mr. Eversman:

What difference does it make whether he offered these bonds or did not offer these bonds?

The Court:

He is probably going to show that these bonds were in the hands of innocent holders, is that not so, Mr. Welles?

Mr. Welles:

We expect to show that; also to show that A. C. Allyn & Company bought the bonds in the first place in reliance upon a letter from Mr. Albert Emanuel, which contains the statement:

'The franchises under which the company operates are satisfactory in form and without burdensome restrictions.'

That refers to Norwalk as well as the other companies.

Mr. Eversman:

That would not be binding upon the city, if Your Honor please.

The Court:

I doubt whether that would be relevant. Make up your record on it. I think you have a right to show that these bonds were in the hands of innocent holders.

Mr. Welles:

Are we not entitled to show that the vice-president of the Ohio Electric Power Company, having the advice of counsel we have shown, in turn conveyed to the bankers the information that they had franchises; and that the bankers then sold these bonds on a circular stating they had franchises? This is a bond-offering circular.

The Court:

I know. The difficulty with it is it is so indefinite. How could the city be bound by anything of that sort in any case?

Mr. Welles:

Of course the question whether it is indefinite may go to its weight. If I do not show it applied to Norwalk, Your Honor will be justified in disregarding it, of course. But I expect to show that by this witness.

The Court:

This is a circular put out by A. C. Allyn & Company?

Mr. Welles:

Yes, Your Honor.

The Court:

What more do you propose to show, that this went to various bondholders who purchased the bonds?

Mr. Welles:

Yes.

The Court:

I think it is relevant.

Mr. Eversman:

Note an exception.

The Court:

Save the defendant an exception to all this testimony.

Question read.

A. Yes, sir."

Plaintiff's Exhibit No. 78 is a circular of A. C. Allyn & Company offering Ohio Electric Power Company First Mortgage Gold Bonds, Series A, 6½% Sinking Fund.

This circular deals with the $949,000 of Ohio Electric Power Company bonds I have just mentioned. Prior to the issuance of that circular, I believe the Ohio Electric Power Company had acquired the Norwalk property. There are certain references to the Norwalk properties in this circular at points marked in the margin in pencil. Those references are to the electric light and power plant and distribution system at Norwalk, formerly operated by The Cleveland & Southwestern, and then by Albert Emanuel. The letter dated New York City, New York, August 24, 1925, purporting to have been signed by Victor Emanuel, vice-president, printed in full on the inside of this circular, was received by A. C. Allyn & Company before that circular was put out.

"Q. What, if any, knowledge or information did A. C. Allyn & Company have with respect to the franchise situation at Norwalk before it put out this circular, Exhibit No. 78? A. We understood and relied in the purchase of these bonds by virtue of a statement that the franchises under which the company operated were satisfactory and not burdened with unusual restrictions of any kind.

Mr. Eversman:

We move to strike that answer out as not being responsive.

Mr. Welles:

I think it is responsive.

The Court:

As far as it refers to a reliance, it is not responsive and that may go out.

Q. In your answer were you referring to the statement in Mr. Emanuel's letter, which appears in Exhibit No. 78, reading: 'The franchises under which the company operates are satisfactory in form and without burdensome restrictions'? A. I was.

Q. You may state whether or not you understood that statement given in Mr. Emanuel's letter to apply to Norwalk as well as other cities mentioned in the circular? A. We so understood.

Q. I wish you would state, Mr. Yeager, what, if any, importance there was in connection with the purchase of this bond issue by your firm, in the fact that the City of Norwalk—the electric light and power properties in the City of Norwalk, and, as you understood, a franchise to operate them in the City of Norwalk, were included among the properties under the mortgage?

Mr. Eversman:

Objection to that, if Your Honor please. You can see the impropriety of the question.

The Court:

All he is really trying to find out is whether he attached any importance to the Norwalk properties.

Mr. Eversman:

Even so, the answer will be so indefinite and uncertain it cannot help the court.

The Court:

Your objection goes to the weight of his testimony rather than its relevancy. Overruled. Save your exception.

Mr. Eversman:

We further object to its relevancy. Exception.

Witness:

Certainly we understood that added to the values of the properties, and thereby fixed the amount of the bond issues we would care to purchase and offer for resale."

My understanding was that approximately $130,000 of the bonds—thereabouts—included in the $949,000 was based on the acquisition of the Norwalk properties.

"Q. You may state whether, without the Norwalk properties including a franchise, such an amount of bonds would have been salable based on the rest of the property only, in your opinion?

Mr. Eversman:

Objection.

The Court:

Overruled. Save your exception.

Mr. Eversman:

Exception.

A. In my opinion, certainly not."

I have had a number of such transactions, dealing with bonds of public utility corporations.

"Q. What, if any, importance is there in connection with the purchase and resale of bonds of public utility corporations in the question as to whether the public utilities have or have not franchises?

Mr. Eversman:

Objection to that, if Your Honor please.

The Court:

What is the purpose of that?

Mr. Welles:

I want to show that in his opinion as an expert in that line of business, bonds of public utilities are not salable unless they are backed by franchises.

The Court:

It seems to me the answer to that is obvious.

Mr. Welles:

I think so.

The Court:

All right. Let him answer it.

Witness:

It is of the greatest importance.

Mr. Eversman:

We ask that the answer be stricken.

The Court:

Overruled.

Mr. Eversman:

Exception."

My opinion is that the full amount, $949,000 of bonds offered by circular, Exhibit No. 78, could not have been offered in that amount on the basis of the properties then owned by the Ohio Electric Power Company, if it had been a fact that the company had no franchise rights to operate its Norwalk properties, and that they could not have been successfully sold.

All this evidence went in over objection of defendant.

Plaintiff's Exhibit No. 79 is a circular of A. C. Allyn & Company, Inc., offering certain bonds of the Ohio Electric Power Company and dealing specifically with the First Mortgage Gold Bonds, Series B, 6% Sinking Fund, in the amount of $647,000. This circular deals specifically with the Series B bond issue, but with the whole picture, the First Mortgage Series A and the First Mortgage Series B bonds are all under the same mortgage; and, therefore, the entire story affects the entire issues under that same mortgage. Exhibit No. 79 was put out in connection with the offering of Series B 6% bonds. The original of the letter on the inside of Exhibit 79 addressed to Messrs. A. C. Allyn & Company, dated New York, August 26, 1926, purporting to be signed by Victor Emanuel, vice-president, was received by A. C. Allyn & Company before those bonds were offered and this circular put out.

What I have said, with respect to the importance of the Norwalk franchise, in respect to the $949,000 series of bonds, also applies to this circular, and to the offering of this $647,000 series of "B" bonds.

"Q. Did you or did you not understand the statement of Mr. Emanuel in the letter which is included in Exhibit 79, reading: 'The franchises under which the company operates are satisfactory in form and without

burdensome restrictions,' to refer to the situation at Norwalk as well as at the other cities mentioned in the letter?

Mr. Eversman:

Objection.

The Court:

Overruled.

Mr. Eversman:

Exception.

A. It was so understood."

The result of the offering of these bonds was that they were all sold, and these circulars were submitted to prospective purchasers of the bonds, and the sale was made by A. C. Allyn & Company to these purchasers for value.

"Q. What, if you recall, did these bonds sell at?

Mr. Eversman:

What time, Mr. Welles?

Mr. Welles:

When A. C. Allyn & Company sold them.

Mr. Eversman:

In 1925.

Mr. Welles:

The original offering. I am speaking now of the two series?

Mr. Eversman:

Objection to that. It is entirely irrelevant and immaterial when he sold them.

The Court:

He may answer that. Save your exception.

Mr. Eversman:

Exception.

Witness:

At a very slight discount from par; the exact figure I cannot recall.

Q. Have you any opinion, Mr. Yeager, as to what effect, if any, there would be upon the market value of the outstanding bonds of the Ohio Electric Power Company, secured by mortgage on its Norwalk properties and its other properties, if it should be finally determined that the City of Norwalk has the power and has exercised the power to terminate all of the Ohio Electric Power Company's rights to use and occupy the streets and public places of the City of Norwalk?

Mr. Eversman:

Objection to that, if Your Honor please. It is irrelevant and immaterial.

The Court:

Overruled. Save your exception.

Mr. Eversman:

Exception.

Witness:

It would have a very adverse effect; not only because it would destroy some of the security for the bondholders, but it would lead the bondholders to question what might happen in other situations if the same procedure were followed. It would have a very serious effect.

Mr. Eversman:

Objection to that.

The Court:

The collateral effect of this litigation is not important. Would it have any effect upon the market value of these particular bonds? A. It would.

The Court:

That is all we are interested in.

Q. What effect? A. An adverse effect.

Q. Decrease their market value?

Mr. Eversman:

Objection.

The Court:

That is relevant. Save your exception.

Mr. Eversman:

Exception.

A. Decrease their value.

Mr. Welles:

You may cross examine.

Mr. Eversman:

That is all.

Mr. Welles:

That is all, thank you, Mr. Yeager."

Thereupon, plaintiff offered in evidence Plaintiff's Exhibits Nos. 78 and 79, in connection with the testimony of Mr. Yeager.

"Mr. Eversman:

Objection, upon the ground that they are irrelevant and immaterial to the issues in this case.

The Court:

They are admitted, with exceptions saved to the defendant.

Mr. Welles:

They will be received, Your Honor?

The Court:

Yes."

Thereupon, in rebuttal, the plaintiff called as a witness in its behalf

ROBERT L. CHRISTIAN,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Boxell:

I now reside at Cleveland, but formerly resided at Norwalk, which place I left in 1917. I went to Norwalk from Cleveland in 1901 and I resided there continuously until 1917 or thereabouts. When living in Norwalk, I was a reporter in the newspaper business and, also, clerk of council from 1912 until the fall of 1917, when I left Norwalk. I recall attending a mass meeting held in the Assembly Hall of the fire department in the fall of 1914. It was not in the same building where the council met. It was a mass meeting of Norwalk citizens, and members of the council were present at the meeting. Mr. Myers, of Ashland, and Mr. Wolf, also, were both present at that meeting, representing The Cleveland & Southwestern Railway Company, then operating the electric light system in the city. Mr. Myers and Mr. Wolf addressed those present. Other people, citizens of the town, were present and, also, made talks.

"Mr. Boxell:

I presume there will be no objection to the use of a copy of this newspaper account?

Mr. Eversman:

In place of the newspaper itself?

Mr. Boxell:

Yes.

Mr. Eversman:

No."

This bound volume looks like a file of The Reflector-Herald, which was a daily newspaper published in Norwalk, Ohio. It was a Republican paper.

Attention of witness was called to what appears to be an issue of Saturday, November 21, 1914, and an article therein entitled "Municipal Light Ownership Is Still in the Lead."

This is an account of the meeting held November 20th, in Norwalk, an account of the mass meeting I have referred to, and the article was written by myself. It is a faithful, accurate reproduction of the events of the meeting which I have referred to. I have looked over

that particular article and refreshed my memory as to what was said at this particular meeting.

Mr. Myers was in a rather apologetic frame of mind that night. He admitted that they had been remiss in their duty to Norwalk, perhaps, on the electric light plant, and wanted to show they were in good faith and would make good, and asked that they be given an opportunity to revamp their plant to a certain extent and show their good faith in the matter toward Norwalk. The subject of a municipal lighting plant was under discussion at the meeting. The city had voted bonds for the municipal light plant and this meeting was held after the election, but I could not tell just how long. I don't recall that Mr. Myers talked about the municipal light plant directly. My recollection is that his company wanted a chance to make good there. The company was willing to spend some money, and if the city was not satisfied at the expiration of the trial period, which was the balance of the company's franchise, or the time it had to run, or whatever you want to call it, the company would back out or sell out. At that time, there was a street lighting contract, which expired the following year. I do not recall that the discussion at this meeting related to a new street lighting contract in any way. Mr. Myers said, as I stated before, that he was there in an apologetic frame of mind. I would not undertake to say what he said, sixteen or seventeen years after the meeting was held; but I bank on that article. I quoted Mr. Myers in that article; whatever the quotations are there, are correct. I could give you substantially what was said by an inspection of the article in the paper. Whatever he was quoted as saying there, I will say that he said. Whatever is quoted there were the words of Mr. Myers, as near as they could be reported by a man who was not taking shorthand. To read that article refreshes my recollection. Mr. Myers said, just as I already told you, "We know we were guilty of acts of omission and we are now prepared to give you better service." He asked them to give his company a trial; give his company a chance to make good, to revamp its plant and give better service than it had been giving. Neither Mr. Myers nor Mr. Wolf, at this particular meeting which is reported in the issue of November 21, 1914, requested or referred to a franchise from the city. I will say this: I was there and reported that meeting for the newspaper; and if they had said anything about that, it would have been right up on top; that would have been the principal item of news at that meeting; it would not

have got by me. I do not recall that anything was said about a franchise. My recollection is that nobody, either the citizens or any representative of the company, at that particular meeting, referred to a franchise.

I was clerk of the city council from January, 1912, to about October, 1917, nearly six years. I do not recall any legislation by the City of Norwalk durjng that period looking to any change or having any reference to the way in which The Cleveland, Southwestern & Columbus Railway Company should use the streets of the City of Norwalk for its electric distribution lines.

"Mr. Boxell:

We will offer Plaintiff's Exhibit No. 80, which is a copy.

The Court:

I don't think that is relevant. His testimony on the subject is relevant and he has covered it on the point you are really interested in.

Mr. Boxell:

I shall not insist upon it. You may cross examine."

CROSS EXAMINATION

By Mr. Martin:

Numerous council meetings were held about that time, with reference to the light proposition. I do not recall Mr. Myers ever being present but this one time. Possibly, I might not have been there, if it was an afternoon meeting, but I think I would have been. At that discussion that night, quite a lot of feeling developed, and quite a number took part in the discussion. They complained of the service. I remember Mr. Harkness complained that he could not get any service for his elevator. I remember that, at nearly every meeting, cards showing an outage in the street lights were presented by various citizens, and the electric light company was notified of the outage and its bills were reduced by that outage. I remember of citizens coming and complaining to council of the service on some of the streets, and the company's attention was called to the matter, sometimes by individuals and sometimes by councilmen. Mr. Wolf may have been down there several times, I would not say exactly. I rely mostly on the newspaper article for refreshing my memory. At that time, the bonds had been voted by the city. There was some talk of the officials of the Green Line trying to prevent the sale of the bonds by a taxpayer's suit. I don't remember whether such a suit was started or not.

They said they wanted the city to give them an opportunity to make good for the balance of their street lighting contract. I can not give you any more concrete language than I have. I am relying upon this article; and have been out of Norwalk for nearly 15 years. My recollection comes very largely from this paper.

The bond issue, I think, was for $100,000 or $125,000.

RE-DIRECT EXAMINATION

By Mr. Boxell:

In the requests of Mr. Myers and Mr. Wolf, at this meeting, I think that they asked that they be given an opportunity to make good during the balance of their street lighting contract.

Thereupon, in rebuttal, the plaintiff called as a witness in its behalf

A. A. RUFFING,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Boxell:

I reside at Norwalk and have lived there practically all my life, outside of five years. I was on the council two years in 1924 and 1925. I recall attending a mass meeting in the City of Norwalk, in the fall of 1914, in relation to the lighting situation there. It was held in November, 1914, in the city building, in the council chamber and fire department, and in the evening. Quite a number of citizens were there and, representing The Cleveland, Southwestern & Columbus Railway, were two men, F. E. Myers and Mr. Wolf. These men talked to

the meeting. I recall some of their talk. The talk of Mr. Myers was regarding a contract for a year or two trial of lighting the city. It had reference to the street lighting. He said he wanted to show the people of Norwalk that the company could do better than it had done in the past. Mr. Wolf stated that they wanted another trial; he said about the same thing. No request was made there for a franchise, or any franchise discussed. Other people spoke at the meeting, citizens of the Town of Norwalk—Mr. McKnight, Mr. Martin, Mr. Craig and Mr. C. H. Gallup. Nothing was said about a franchise. The Craig and Martin, referred to, are G. Ray Craig and Edgar Martin, now present in the court room.

While I was a member of the council in 1924 and 1925, no legislation having to do with the manner in which electric lighting companies or telephone companies should use the streets with poles and wires, other than an ordinance of July 1, 1924, was passed.

CROSS EXAMINATION

By Mr. Martin:

This meeting was held in a hall over the fire department, but it was not the council chamber. I thought it was the council chamber at that time. Afterwards it became the council chamber. I remember Mr. Titus and Mr. Harkness speaking about the condition of the lines and wires, and the fact that they could not get any power in their houses; but I don't remember that any of the Green Line officials stated that they would have to rebuild all their lines, if they continued there, nor do I remember their saying anything about the condition of the wires, nor any complaints about the burning of trees. I will not say that was not said. It was rather an exciting meeting, and a lot of criticism was made of that system. They asked for a contract with the city for a year or two. I am not sure that they used the word "contract," they might have used the word "agreement." I did not hear anything discussed about commercial lines. I don't remember that Mr. Harkness complained that he could not get power to move his elevator. I remember Mr. Harkness was there, but don't remember what he said.

RE-DIRECT EXAMINATION

By Mr. Boxell:

This place where the meeting was held did become the council chamber. It must have been shortly afterward. The contract or agreement, which has been referred to, related to the lighting of the city, of the streets and public places.

Thereupon, in rebuttal, the plaintiff called as a witness in its behalf

L. J. WOLF,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Welles:

I reside at Cleveland and my business is investments. I was Vice-President of The Cleveland & Southwestern for a number of years, but I do not remember the period. It included the year 1914. I recall going to Norwalk with F. E. Myers and taking part in a public session on the subject of electric light and power service. Mr. Myers was president of the corporation. I was there on that errand, I think, only once; that, as I recall, was in the year 1914. I do not remember the character of the structure where the meeting was held, but my recollection is that there were two meetings, an afternoon and an evening meeting, I am not certain about that. I think in the afternoon, we met with the councilmen in an informal meeting, and the evening meeting was more of a mass meeting. I was with Mr. Myers at both meetings and heard what was said, if there were two meetings. If there were two meetings, I took part in what was said

at both of them. Mr. Myers discussed the character of the service we had been giving, and was apologetic and desired an opportunity to prove that we could improve the service. That is, I think, summing up what he said. I had more direct charge of the operation than Mr. Myers did, and, therefore, I went into details further than he did. I explained that the transmission lines from Elyria to Norwalk, which were used to a considerable extent for the service there, I explained that they were installed at an early stage of the art of high tension transmission; and that meanwhile the art had been improved. Thus it was learned that the wires should be spaced farther apart as the pressure or voltage was higher than had obtained in the early day of the construction of these lines; and it is, also, true that by that time the poles, transmission poles, were somewhat affected by age and, therefore, would not withstand the high winds as they did, when they were new; and they were being replaced—it was just developing then—either by concrete or steel poles. So that we felt—and I explained—that if we were given an opportunity to demonstrate to the City of Norwalk that we could improve their street lighting, we would like them to give us that opportunity, and we would invest the money necessary to do this. I said to them, as I remember:

"If you go ahead, as I understand you contemplate, installing a municipal plant for the purpose of street lighting, you inevitably compete with us on commercial lighting; that is the trend of those things; and that will naturally affect our opportunity to make money and your opportunity to make it pay. The city is not big enough to justify competing systems, and there is not enough business here to justify your coming in to compete with us."

So I was trying to persuade, as best I could, the citizens and council to defer, at least, any investment on the part of the city until such time as we could demonstrate that we could give them this service or street lighting by investing this additional money necessary to rehabilitate the service and to rehabilitate the lines.

The entire purpose of this conference was to renew the street lighting contract, if we were able to make good. We never considered and never felt that there was any question about our right to stay there for commercial and industrial purposes. The only question was whether the street lighting contract should be renewed, and we did not ask for a long time renewal because we felt that because of our service not having been as satisfactory as

it could have been, it was up to us first to demonstrate that we could give this improved service for street lighting.

Neither Mr. Myers nor I, or anybody else, requested that the city or its citizens should consider giving us a commercial franchise. There was no discussion of our securing a right from the city of a franchise from it for commercial and residential lighting.

(Witness shown Plaintiff's Exhibit No. 81, a copy of letter sent by F. E. Myers to the city council, City of Norwalk, in October, 1914.)

Plaintiff's Exhibit No. 81, as I remember, is a letter sent by Mr. Myers to the mayor and city council of the City of Norwalk shortly prior to the meeting, which he and I attended. The outcome of that letter was the attendance by Mr. Myers and myself of the meeting in Norwalk.

Plaintiff's Exhibit No. 81 offered in evidence, there being no objection on the ground that it is a copy.

CROSS EXAMINATION

By Mr. Martin:

I do not remember any statement by Mr. Myers that if they could not get a contract or permit or franchise that they would be glad to sell the city power. In this letter, Exhibit No. 81, we offered to sell power to the city. Mr. Myers said if the city built its own plant, he would be glad to furnish power, but that was not in the form of a franchise; he was not asking for a franchise. This meeting was after the election on the bond issue, and I think in 1914.

I don't remember that an action had been brought to question the validity of the bonds issued. I don't remember whether that was discussed at that meeting. It may have been. There was some discussion at some time of a bond issue and the validity of it. I was not there more than once to attend meetings, but used to go to Norwalk quite frequently and met the city officials at other times and discussed the matter in an informal way. I don't think Mr. Myers was there more than that time. He may have been at another time. It may be we went there in a special car. We made inspections of the road occasionally. I remember Mr. Myers stating that inasmuch as the city was insisting upon building its own distribution, the Green Line would be glad to furnish power, but my recollection is that that was for street

lighting. The letter was sent out prior to the mass meeting. I do not recall Mr. Myers saying that if they could not get an agreement with the city they would have to take the poles off the streets.

I was present at a formal meeting, that is my recollection; I think I have met several times, as I said before, at informal meetings with the council, or some of the city officials, but not relative to a continuance in the city, but relative to a continuance of the right to light the streets. There was never any question in my mind about our right to continue in the city and that was by advice of counsel too. We never discussed anything, as I remember it, but the lighting of the streets.

RE-DIRECT EXAMINATION

By Mr. Welles:

At these several other informal discussions, which I have mentioned, I don't remember whether I was the only representative of the company. Mr. Myers may have been present, and I believe our local manager of the lighting plant; in fact, we had two managers at two different times. I think each of them was present at such conferences as we had. Mr. Myers, once or twice, as I recall, went with us on an inspection tour of the whole line. Mr. Myers died about a year and a half ago.

Thereupon, in rebuttal, the plaintiff called as a witness in its behalf

A. A. RUFFING,

who, having been heretofore duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Boxell:

Plaintiff's Exhibit No. 82 is a circular, signed by Mr. Turkle, local manager of the Ohio Electric Power Company, copies of which were generally circulated by the Ohio Electric Power Company among its customers in Norwalk.

Plaintiff's Exhibit No. 82 offered in evidence and admitted without objection.

Plaintiff's Exhibit 83 with the engineer's certificates attached thereto was admitted, not as evidence of value, but only as evidence of what the trustee had before it at the time of authenticating and delivering the bonds referred to in said exhibit on the question of the compliance of the Ohio Electric Power Company and the trustee with the provisions of the mortgage indenture and the mortgage supplemental thereto, under which the bonds were issued.

Plaintiff's Exhibit 84, being a record of the council meeting of the city council of Norwalk March 25, 1915, was offered and admitted over the objection of the defendant that it was irrelevant and immaterial, defendant reserving an exception to its admission.

"Mr. Welles:

We have pending an objection to Defendant's Exhibit C. We desire to stand on our objection to all of it except that part of it beginning with the words: 'Property Section,' and from then on to the end of it we withdraw our objection."

SURREBUTTAL

Thereupon, the defendant, in surrebuttal, called as a witness

EDGAR G. MARTIN,

who, being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Craig:

I was mayor of the City of Norwalk in 1914 and served in that capacity two consecutive terms. I remember various discussions relative to the electric light situation in the City of Norwalk throughout the years 1914 and 1915. When I was mayor in Norwalk in 1914, I recall that F. E. Myers came to Norwalk, in connection with the business of The Cleveland, Southwestern & Columbus Railway Company, bearing upon the lighting situation. He came there on more than one occasion. I was present in my capacity of mayor of the City of Norwalk, when any discussion took place between Mr. Myers and myself, or among Mr. Myers, myself and other officers of the city.

A discussion took place at the council chamber proper in the Whittlesey Building, some time in the year 1914, and I think Mr. Nester was present, and, at one time, Mr. Wolf; and at another time, I don't know whether Mr. Wolf was present, but Mr. Frank Ginn was present. C. B. Lawrence was not a councilman at that time, but George Fifner was a member of the council. I have no personal recollection whether Mr. Fifner was present or not; but recall a conversation with Mr. Myers, concerning a franchise, in which I participated in connection with the company's business in the City of Norwalk. The conversation came up after the vote on the bond issue. I told him we had gone on so far with it; we had the vote of the people, ten to one, and we were going ahead with the municipal plant. He said, "Then, in that case, we will have to get out of Norwalk." He said, "Why can't we sell you power? You have your own distributing lines and furnish lights and customers, and we will rebuild our power plant and furnish you the power." That was in 1914, in the fall. I think he said he would submit a proposition as to the price for which they would furnish power, and we do our own distributing.

My recollection is that Mr. Myers stated his company wanted a new franchise; that it would have to spend a lot of money. It would not go ahead until it had a franchise justifying the expenditures. I can not tell whether that was in the council room or whether it was in my office as mayor or not; but the statement was made.

At the meeting at the fire department hall, the question of street lighting, commercial lighting and franchise was discussed. It was discussed at all these meetings. Some time in those discussions—I can not recall which one—the statement was made that the company would sell us power.

During the four years I served as mayor, there were continued complaints regarding the service, relating to all kinds of service, to the commercial, as well as the public lighting, and complaints that the transmission line was down, and that it was not furnishing power and light. We were without lights and power, as I recall it, in the winter time in storms—there was trouble with the transmission lines—I don't know how long the interruptions were. When the power was off, there was no way of supplying it, and the business places and streets were then in darkness.

CROSS EXAMINATION

By Mr. Welles:

I do not recall receiving Plaintiff's Exhibit No. 81, the original of it. It seems familiar to me, such a letter, but I have no personal recollection of it. I probably did receive it—I don't think there was any correspondence with Mr. Wolf whatever, as I recall it. I have not made any search, nor had any made, of the files of the mayor and the city council, to see whether there are any other letters from Mr. Myers or Mr. Wolf, or anybody else, representing the company, in which they mention the word "franchise." I don't think I received, during my term of service, any letter from any representative of the company, in which they suggested the granting of a franchise.

Thereupon, the defendant offered in evidence Defendant's Exhibit T, being a report of the receiver of The Cleveland, Southwestern & Columbus Railway Company to the Honorable Judge Westenhaver, in the case of General Electric Company vs. The Cleveland, Southwestern & Columbus Railway Company in the United States District Court for the Northern District of Ohio,

Eastern Division. The exhibit was admitted over objections of the plaintiff.

"Mr. Welles:

He is not entitled to this preliminary report of the receiver, to begin with. He is just taking his first crack at it. Suppose he left out a car on the railroad; does that mean they did not own it, if he reported 99 cars and they owned 100?

"Mr. Eversman:

I think it is as good as the evidence of Mr. Wolf.

"The Court:

I do not see how that is binding on the plaintiff.

"Mr. Craig:

It may not be; but it seems to me it is one of the circumstances to be considered by this court in view of the different items of circumstantial evidence.

"The Court:

I will hold it and you can search that case to see if there is any other report of the receiver.

"Mr. Welles:

Yes. Maybe we will find a second report in which he put in a record.

"Mr. Craig:

In Exhibit 27 offered in this case reference is made in the deed of the special master of the Cleveland and Southwestern Railway to a list of the property that was sold by the receiver or by the special master. I am offering it for the purpose of showing, as I said some time ago, that it is a circumstance here, among all other circumstances, indicative of whether or not there was any franchise.

"Mr. Welles:

I don't believe the receiver's opinion is as good as Mr. Craig's."

By stipulation of the attorneys for the respective parties herein, it was agreed that the depositions of C. E. Tucker and John R. Berry taken July 15, 1927, in the case of State of Ohio on relation of Edgar G. Martin, Prosecuting Attorney of Huron County, State of Ohio, vs. Ohio Electric Power Company, in the Court of Appeals of Huron County, Ohio, could be offered in evidence by defendant.

Thereupon, the defendant, offered in evidence the

DEPOSITION OF C. E. TUCKER,

who testified as follows:

DIRECT EXAMINATION

By Mr. Craig:

I reside at Norwalk, Ohio, and will be 50 years of age in September. I was formerly clerk of the Court of Common Pleas and of the Court of Appeals of Huron County, and, prior to that time, served as deputy clerk. I commenced my duties as deputy clerk in 1899 and served three years and then went to the Probate Court as deputy clerk thereof, where I served seven years, during the incumbency of Judge Charles Suhr, except the latter part of his term, when I was elected clerk. I commenced my duties as clerk of the Common Pleas Court in August, 1909, and served four years, my term expiring in 1913. During the time I was clerk of the Court of Common Pleas and of the Court of Appeals of Huron County, I had charge of the records and all papers and documents of every kind that were in the court. Since I left the clerk's office, I have been an abstractor of land titles and am now president of The Holiday & Tucker Company, an abstract company of this city. Since leaving the clerk's office, I have been continuously in touch with it. I was clerk of the Court of Common Pleas at the time the court house burned in 1912. I had no personal knowledge of any of the papers, files or exhibits pertaining to the case of Cutter vs. Incandescent Light & Power Company, No. 3994 on the appearance docket of the court, neither do I remember having seen the papers, files and exhibits in that case, while I was acting as clerk. The files, exhibits, bills of exceptions and any documents that were offered in evidence, or any records that were offered in evidence, that were not called for by the parties or attorneys, after the case had ended, were all kept in one end of the garret of what was the third story of the old court house. In fact, all the files in the cases, prior to about the year 1892, were there. They were arranged or put in pasteboard boxes and the exhibits and bills of exceptions and so on were on the shelves and some of them tied in bundles. I was in the city when the court house burned in 1912. The fire occurred about eleven o'clock at night. I was present at the fire, soon after it started, and it started in

the room on the southwest corner, where these files were located. None of the files or the contents of the garret or room were saved from the fire. They attempted to save them, but they were so badly burned they were all taken down and hauled out and dumped with a lot of rubbish. Nothing was saved above the second floor in the way of records and papers. The fire occurred July 9, 1912.

At Mr. Craig's request, I made a search for the files, documents, exhibits and any other pleadings or papers in Case No. 3994—Cutter vs. Incandescent Light & Power Company et al.—and went to the third floor of the building yesterday, and found nothing; I found a few of these papers, which are the pleadings, but could not find any record book or any minutes or books or papers of any kind relating to The Incandescent Light & Power Company.

The building, to which I went to make my search, is the building that was constructed after the old court house was injured by fire. The overflow files are now kept in the attic of the new building. I looked for files both in the attic and the clerk's office. I was acquainted with the late C. L. Kennan, who was the master in the Cutter case. He died two or three years ago.

No cross examination.

Thereupon, the defendant offered in evidence the

DEPOSITION OF JOHN R. BERRY,

who testified as follows:

DIRECT EXAMINATION

By Mr. Martin:

I am clerk of courts of Huron County and have in my possession and under my control records of pending cases, and the files of the older cases and all records. The bound volume, to which you have called my attention, is Volume 22 of Appearance Docket of Huron County Common Pleas Court, which is a record kept in my office. In the appearance docket is entered the appearance of all cases filed in the Court of Common Pleas. Case No. 3994, at page 53, is the case of George Cutter vs. The Incandescent Light & Power Company, of Norwalk, Ohio, and Thomas Dunmore, and others. The filing date is March 9, 1893.

Volume 54 of the Law Record of said Court of Common Pleas is one of the books under my control and is a record of the proceedings of the case in the Court of Common Pleas. The case of George Cutter against The Incandescent Light & Power Company, and others, commences at page 390 and extends to page 421.

At the request of counsel, I made a search for original papers, exhibits and documents among the files in my possession, and could find nothing, excepting the files, which are the pleadings in the case. We found no exhibits and could not find any books or records of The Incandescent Light & Power Company, or any other papers. In other words, I could find nothing, except the pleadings, and I made my search in our office, in our files, and in the room used by me in the attic for the storage of the papers. Mr. C. E. Tucker, the former clerk, assisted me in making the search.

No cross examination.

RECAPITULATION OF OFFERING AND ADMISSION OF EXHIBITS

No objection was offered by either party to the admission of any exhibits upon the ground of lack of authenticity or incompetency. All objections to exhibits were upon the ground of irrelevancy or immateriality. Where it is stated hereafter that there was an objection to the admission of an exhibit it is to be understood that it was upon the ground that such exhibit is immaterial and irrelevant to the issues of this case, as more particularly hereinabove set forth.

Plaintiff's Exhibits 1 to 47 were offered and admitted at the opening of the hearing. Defendant objected to that portion of Exhibit 1 which refers to the payment of taxes by the Ohio Electric Power Company and its predecessors and was allowed an exception to the admission of that portion of the exhibit.

Plaintiff's Exhibit 48 was offered and admitted in connection with the testimony of John F. Kreider (page 89, supra).

Plaintiff's Exhibits 49 and 50 were offered in connection with the direct examination of Alfred B. Greenfelder (page 131, supra) and were admitted.

Plaintiff's Exhibits 51 to 69 were offered in connection with the direct examination of Dwight E. Turkle (page 94, supra). They were admitted over the objection of the defendant and defendant was allowed an exception in respect to such admission.

Defendant's Exhibits A and B were offered in connection with the cross examination of Dwight E. Turkle (pages 100 and 101, supra). Defendant's Exhibit A was admitted without objection. Defendant's Exhibit B was admitted over the objection of the plaintiff and the plaintiff was allowed an exception to such admission.

Defendant's Exhibit C was offered in connection with the cross examination of William Insull (page 120, supra) and was admitted over the objection of the plaintiff and the plaintiff was allowed an exception to such admission. Plaintiff before the end of the trial withdrew its objection to that part of Exhibit C beginning with the words "Property Section" and from there on to the end of it, but insisted upon its objection to the rest of the exhibit.

Defendant's Exhibit D was offered in connection with the cross examination of William Insull (page 121, supra) and was admitted.

Plaintiff's Exhibits 70 to 75, inclusive, were offered and admitted at the close of plaintiff's case in chief.

Defendant's Exhibits E, F, G, H, I, and J were offered at the opening of defendant's case. Exhibits E and J were admitted without objection by the plaintiff. Defendant's Exhibits F, G, H, and I were admitted over the objection of plaintiff's counsel and plaintiff was allowed an exception to such admission.

Defendant's Exhibits K, L, M, N and O were offered in connection with the direct examination of M. G. Irvin (page 151, supra). The plaintiff objected to all of these exhibits. Exhibit M was admitted generally and Exhibits K, L, N, and O were admitted as illustrative of the testimony of the witness, the plaintiff being allowed an exception to the admission of such exhibits.

Defendant's Exhibit P was offered in connection with the direct examination of M. G. Irvin (page 162, supra) and was admitted over the objection of the plaintiff and the plaintiff was allowed an exception.

Defendant's Exhibit Q was offered in connection with the direct examination of Warren D. Spengler (page 168, supra) and was admitted over the objection of the plaintiff. The plaintiff was allowed an exception to such admission.

Defendant's Exhibit R, being the copy of the testimony of John R. Berry in the case of State of Ohio ex rel. Martin, was admitted pursuant to stipulation of counsel and is contained in the narrative transcript as a part thereof at page 206, supra.

Defendant's Exhibit S, being a copy of the testimony of C. E. Tucker in the case of State of Ohio ex rel. Martin, was admitted pursuant to stipulation of counsel and is contained in the narrative transcript of the evidence as a part thereof at pages 204 and 205, supra.

Plaintiff's Exhibit 76 was offered in connection with the direct examination of L. B. Fauver (page 180, supra) and was admitted over the objection of the defendant. The defendant was allowed an exception to such admission.

Plaintiff's Exhibit 77 was offered in connection with the direct examination of L. B. Fauver (page 183, supra) and was admitted over the objection of the defendant as to the materiality and relevancy thereof, and the defendant was allowed an exception.

Plaintiff's Exhibits 78 and 79 were offered in connection with the direct examination of Leland E. Yeager (page 190, supra) and were admitted over the objection

of the defendant. The defendant was allowed an exception.

Plaintiff's Exhibit 80 was offered in connection with the examination of Robert L. Christian (page 193, supra) and was admitted.

Plaintiff's Exhibit 81 was offered in connection with the direct examination of L. J. Wolf and was admitted.

Plaintiff's Exhibit 82 was offered in connection with the direct examination of A. A. Ruffing (page 200, supra) and was admitted.

Plaintiff's Exhibit 83 was offered at the close of plaintiff's rebuttal evidence and was admitted without objection for the limited purposes as stated above (page 200). Plaintiff's Exhibit 84 was offered and admitted at the close of plaintiff's rebuttal evidence over the objection of the defendant that it was irrelevant and immaterial, and defendant reserved an exception to its admission.

Defendant's Exhibit T was offered at the close of the case and was admitted over the objection of the plaintiff. The plaintiff was allowed an exception to such admission.

Defendant's Exhibit U was offered in connection with the reading of the deposition of Charles Suhr and was admitted without objection (page 58, supra).

ORDER

(Filed Nov. 30, 1931)

This cause came on to be heard upon the objections and proposed amendments by plaintiff-appellee to the narrative statement of evidence, whereupon plaintiff-appellee withdrew items 2 and 3 of said objections and proposed amendments, and the court being fully advised in the premises,

It is ordered, adjudged and decreed as follows:

1. The first sentence in the third full paragraph on page 66 of the narrative shall be changed to read as follows:

"I do not have any knowledge about whether in a report made by Ohio Electric Power Company to the Tax Commission of Ohio for the year ending January 1, 1930, all the property of Ohio Electric Power Company in Huron County was returned at a valuation of $19,632.99."

2. In lieu of the sentence beginning "I observed an omission there" in the 10th line from the bottom of page 116 and continuing to the end of the paragraph, there shall be substituted the testimony verbatim as it appears in the transcript of testimony at page 356 beginning "Q. I take it, then * * *" and ending on page 357 "The Witness: I will tell you in a second. $14,550.00 more makes a total of $124,294.00."

3. The reproduction of parts of the testimony of various witnesses in their exact words in the narrative statement of evidence as lodged and amended and as requested by both parties, is hereby directed, allowed and approved.

4. The narrative statement of evidence heretofore lodged by the defendant on September 30, 1931, with the amendments set forth in document entitled "Amendment to Narrative Statement of Evidence" heretofore approved by both parties and filed November 21, 1931, and with the amendments set forth above, is hereby allowed and approved, and upon the correction thereof by the defendant, is hereby ordered filed as a statement of evidence to be included in the record on appeal in the above cause, as provided in paragraph "B" of Equity Rule 75.

Geo. P. Hahn,
District Judge.

Dated November 30, 1931.

Approved:

Earl F. Boxell,
Of Counsel for Plaintiff-Appellee, Chase National Bank of the City of New York.

W. A. Eversman,
Of Counsel for the Defendant-Appellant, City of Norwalk.

MEMORANDUM OPINION

(Filed Feb. 7, 1931)

Hahn, J.:

This is an action for an injunction for the purpose of enjoining and restraining the defendant, its officers, officials, agents, employees and representatives from interfering with or interrupting the continued operation of the plant and electrical distribution system of The Ohio Electric Power Company in the streets, alleys and other public places in the City of Norwalk, &c.; and likewise from taking any steps or proceedings to carry into effect the judgment and decree of The Supreme Court of Ohio, entered in Ohio Electric Power Company vs. State (1929), 121 O. S. 235, 167 N. E. 877.

It has been stipulated in this case that the population of the City of Norwalk, as shown by the United States census, is and has been as follows:

Year	Number
1890.....	7195
1900.....	7074
1910.....	7858
1920.....	7379
1930.....	7775

Early in 1890 a partnership was organized by six men styled "The Norwalk Incandescent Light Company" for the purpose of generating and furnishing electricity in the City of Norwalk. Only one member of that partnership survives. He is Charles Suhr, whose testimony is in this case.

On October 7, 1890, upon application of the partnership, the City of Norwalk by its council passed an ordinance entitled: "An Ordinance to Amend an Ordinance Entitled: An Ordinance to grant certain privileges as therein set forth to the Incandescent Lighting Company of Norwalk, Ohio, passed July 30, 1890."

This ordinance is Exhibit "B" attached to the second amendment and supplement to the bill of complaint. After the passage of the ordinance of July 30, 1890 (which was identical with the October 7th ordinance except the earlier ordinance provided for the use of the Heisler system of incandescent lighting, and this system proved to be impracticable), the partnership had constructed a plant for the generation of electricity on a parcel of real estate that it had rented and had practically completed the erection of a distribution system throughout the City of Norwalk consisting of lines of poles and wires and the usual attachments therefor.

The ordinance of October 7, 1890, ran to the partnership, The Norwalk Incandescent Light Company, its successors and assigns and expressly "granted for the term of twenty years from the passage of this ordinance, the right of way through, in and upon the streets, sidewalks and alleys and public grounds of said city for the use and purpose of therein and thereon erecting and maintaining and using all necessary poles or posts of wood, iron or other suitable material, and the necessary wires to successfully operate and use a system of incandescent lighting in said city" upon certain conditions and provisions set forth in such ordinance.

The undisputed testimony of Judge Suhr is that the ordinance of October 7, 1890, was expressly accepted by a representative of the partnership immediately after its passage and that, within a short time thereafter, the construction of the distribution system was completed and the entire electric plant of the Norwalk Incandescent Light Company put in operation for the purpose of supplying the City of Norwalk with street lighting and the inhabitants thereof with electricity for domestic and commercial use; that the electricity for street lighting was conducted from the generating plant and distributed throughout the city by direct current over wires stretched for such purposes and that the electricity for domestic and commercial use was taken out of the generating plant over other wires designed to carry an alternating current, and both sets of wires were attached to and sustained by the same pole lines. In other words, the testimony of Judge Suhr, and that of all other witnesses, show that on each street of the city the same pole line carried and supported both sets of wires.

In March, 1891, the partnership was succeeded by a corporation styled "The Incandescent Light & Power Company," which was organized and incorporated by the members of the partnership and one or two others for the purpose of "furnishing to the citizens of Norwalk and vicinity electric lighting of both arc and incandescent, electric and steam power and steam and electricity for heating, for profit."

A copy of the Articles of Incorporation of The Incandescent Light & Power Company is Exhibit 3 in the record of this case. The testimony of Judge Suhr that the partnership transferred to the corporation, The Incandescent Light & Power Company, all the partnership property, including the franchise of October 7, 1890, is undisputed.

The corporation took up and continued the operation of the generating plant and the use of the distribution system in connection therewith, the same as they had been operated and used by the partnership and so continued until the 25th day of February, 1893, when, on account of financial trouble, The Incandescent Light & Power Company filed, in the Probate Court of Huron County, Ohio, a deed of assignment covering and conveying "all its lands, tenements, goods, chattels, choses in action, claims, interests, and property of every nature and kind whatsoever" to J. W. Foster and F. H. Jones, as assignees, for the benefit of the creditors of The Incandescent Light & Power Company under the insolvency laws of Ohio.

It has been stipulated herein (Exhibit 71) that certain litigation arose in the Probate Court respecting the priority of the liens of certain creditors; that the case entitled: "The Norwalk Foundry & Machine Company vs. Foster and Jones, Assignees," in which these controversies arose, was appealed from the Probate Court to the Court of Common Pleas of Huron County; and that an order of sale had been issued directing the assignees to sell at public sale the leasehold estate on which the electric plant was located "and all franchises, patronage, good will, and rights of said business." Pursuant to said order of sale Foster and Jones, as assignees, on the first day of March, 1895, sold *all* the property of the Incandescent Light & Power Company to the highest bidder therefor, George P. Jones and Mayme C. Foster, for $13,000. The property ordered sold was described as follows, to-wit:

"An electric light plant, consisting of a leasehold estate for the period of five years from the 22nd day of September, 1890, of the following described property: Situated in the County of Huron, City of Norwalk and State of Ohio, and being forty feet off the east end of Lot No. 934, situated on the southeast corner of Benedict Avenue and Seminary Street in said city, with privilege of drive on east end of said Lot No. 934, together with all buildings thereon, boilers, engines, dynamos, street wires, poles, lamps and all appliances and articles of every kind and description used in and about the business of furnishing arc and incandescent lighting and heating and all *franchises*, patronage, good will and rights of said business." (Italics supplied.)

March 7, 1895, the assignees of the Incandescent Light & Power Company executed and delivered a deed to George P. Jones and Mayme C. Foster for the con-

veyance of the above described property to them, their heirs and assigns. The property conveyed was described in the same language as above set forth.

April 30, 1895, George P. Jones, Mayme C. Foster and others organized a corporation under the laws of Ohio, styled "The Northern Electric Company" for the purpose "of manufacturing and producing electricity for light, heat and power" and with a provision in the articles of incorporation that the corporation was to be located at the City of Norwalk.

May 20, 1895, the same property described in the same language was conveyed by Jones and Foster to The Northern Electric Company.

July 16, 1895, the City of Norwalk entered into a written contract with The Northern Electric Company for lighting the streets and public places of the city for a period of ten years commencing September 1, 1895, such contract being Defendant's Exhibit "G" in this record. The contract provided that the company should build and continually keep in operation for the period of ten years a first class electric light plant. A generating plant was built by The Northern Electric Company on or near Water Street in the City of Norwalk and that generating plant is the same plant referred to in the bill of complaint herein and is now used by The Ohio Electric Power Company for "standby" or emergency purposes.

On June 28, 1897, by amendment of its articles of incorporation, the corporate name of The Northern Electric Company was changed to "The Northern Gas & Electric Company" and its purposes broadened "so as to modify and enjoy the objects and purposes for which said company was organized by authorizing and empowering said company to sell or otherwise dispose of electricity for light, heat and power purposes, and to manufacture and sell, or otherwise dispose of gas for fuel, heating, power or other purposes."

While The Northern Gas & Electric Company was operating its generating plant and the electrical distribution system in connection therewith, another corporation known as "The Norwalk Gas & Electric Company" was incorporated on the 17th day of April, 1900, "for the purpose of manufacturing, producing, furnishing and selling gas and electricity, or either, for light, heating, power and other purposes, and for doing all things incident to said purposes."

On May 8, 1900, The Northern Gas & Electric Company executed and delivered to the Norwalk Gas & Elec-

tric Company a deed conveying the tangible property of the former to the latter and also all the intangible property of the former covered by the following language:

"And also all and singular the tenements, hereditaments, and appurtenances belonging or in any wise appertaining unto the aforesaid property, *rights, franchises and privileges,* and the reversions, remainders, rents, issues and profits thereof." (Italics supplied.)

The operation of the generating plant and the distribution system was then taken up and continued by The Norwalk Gas & Electric Company until February 14, 1903, when it sold and conveyed the above described property to The Cleveland & Southwestern Traction Company and included in such description the following language:

"Also all the other property, real, personal and mixed, and all the franchises, rights and privileges which it now owns."

In the instrument of transfer from The Norwalk Gas & Electric Company to The Cleveland & Southwestern Traction Company there was an express assumption by the Traction Company of the lighting contract which had been entered into on the 16th day of July, 1895, by and between the City of Norwalk and The Northern Electric Company.

No further transfer of The Norwalk Electric light generating and distribution system and franchise connected therewith appears prior to the date of the expiration of the term of twenty years, provided for in said ordinance of October 7, 1890. The street lighting contract hereinbefore mentioned to commence September 1, 1895, expired on the 31st day of August, 1905, and in anticipation of the expiration of that contract on the 13th day of April, 1905, The Cleveland & Southwestern Traction Company entered into a public lighting contract (Exhibit H) with the City of Norwalk to commence at the expiration of the former contract, to-wit: September 1, 1905, whereby The Cleveland & Southwestern Traction Company agreed to maintain and operate one hundred or more arc lights for street lighting in the City of Norwalk, and to furnish incandescent lighting for the public offices and buildings, with certain conditions and provisions respecting the maintenance of the distribution system for the purposes of carrying out the contract.

The same system of poles and wires which were used by The Northern Electric Company for lighting the streets and public buildings of the City of Norwalk un-

der the contract of July 16, 1895, and by The Cleveland & Southwestern Traction Company under the public lighting contract of April 13, 1905, were used by the respective companies and their successors to furnish and provide patrons electricity for private and commercial purposes. The contract of April 13, 1905, between The Cleveland & Southwestern Traction Company and the City of Norwalk was executed prior to the expiration date (October 7, 1910) of the franchise ordinance of October 7, 1890. The public lighting contract extended for a period of five years after such expiration date.

The evidence shows that The Ohio Electric Power Company and its predecessors, to-wit: The Cleveland, Southwestern Railway & Light Company, The Cleveland, Southwestern & Columbus Railway Company, The Cleveland & Southwestern Traction Company, The Norwalk Gas & Electric Company, The Northern Electric Company (also known as "The Gas & Electric Company"), George P. Jones and Mayme C. Foster, The Incandescent Light & Power Company and the partnership, The Norwalk Incandescent Light Company, have all used the same distribution system, namely, the same poles and wires and other attachments as were originally constructed in the streets of the city by the partnership, and that the same property is now in the streets save as replacements have been made on account of decay and depreciation; and that The Cleveland, Southwestern Railway & Light Company and The Ohio Electric Power Company have come into the situation since the franchise of October 7, 1890, expired. The evidence further shows that since the contract of April 13, 1905, which went into effect September 1, 1905, the City of Norwalk has never executed nor entered into any street lighting or franchise agreements with any corporation, association, or person, and further, that no franchise ordinance of any kind has been passed by the council of the City of Norwalk since the 7th day of October, 1890. On July 1, 1924, the council of the City of Norwalk enacted an ordinance regulating the construction and maintenance of electric light and power wires, telephone signal and trolley wires within the corporate limits of the city; and that at the date of the passage of said ordinance wires coming within the provisions of the ordinance were maintained and operated by the Ohio Electric Power Company, or its predecessors, and by the following companies: The Norwalk Telephone Company, The American Telephone & Telegraph Company; The Ohio Bell Telephone Company, The Western Union Telegraph Company, The Lake

Shore Electric Railway Company, The Sandusky, Norwalk & Mansfield Electric Railway Company, and The New York Central Railway telegraph lines, and The Wheeling & Lake Erie Railway telegraph lines, and that in addition thereto the City of Norwalk was maintaining its wires for the distribution of electrical energy.

On March 23, 1926, the council of the City of Norwalk passed a resolution requiring the Ohio Electric Power Company to remove from the streets, alleys, and other public places of the city its electrical equipment erected thereon within thirty days thereafter. On May 18, 1926, said council, upon failure of the Ohio Electric Power Company to remove its equipment, passed a resolution ordering that complaint be filed with Edger G. Martin, Prosecuting Attorney of Huron County, Ohio, requesting such officer to take such legal steps as might be provided by the laws of the State of Ohio in quo warranto to oust the Ohio Electric Power Company from the streets, alleys, and public places of the city.

On May 19, 1926, said Edgar G. Martin, as Prosecuting Attorney, filed, in the Court of Appeals of Huron County, Ohio, a petition in quo warranto against the Ohio Electric Power Company alleging, among other things, that said company had assumed and used, and was then using, certain franchise rights and privileges without lawful authority therefor and without the consent or authority of the State of Ohio or said city, and praying that the Ohio Electric Power Company be required to answer by what warrant it occupied the streets, alleys, and public places of the city, and that it be ousted from using the same. Issue to said petition was made by the filing of an answer thereto by the Ohio Electric Power Company, followed by an amended answer filed in said Court of Appeals on March 21, 1928, wherein it was expressly admitted that the Ohio Electric Power Company had erected and maintained poles, wires, and other electrical equipment in the streets, alleys, and public places of said city for the purpose of doing a commercial and private lighting business therein, and claiming that it was so doing by virtue of rights granted to it by the State of Ohio and the City of Norwalk.

On June 7, 1928, the action in quo warranto, wherein the State of Ohio was plaintiff and the Ohio Electric Power Company was defendant, was submitted to said Court of Appeals on the pleadings and the evidence, and thereupon said Court of Appeals found, upon the issues joined, in favor of the State of Ohio, and decreed and ordered that the Ohio Electric Power Company be ousted

from continuing the use and occupation of the public streets, lanes, alleys, avenues, and other public places of the City of Norwalk for the erection and maintenance of poles, wires, guy-wires and electrical equipment for the purpose of supplying private individuals, firms and corporations of said city with electricity for commercial and private lighting purposes, and from using and exercising any and all said franchise rights and privileges within the city limits of the said City of Norwalk, Ohio; provided, however, that said decree and order of ouster should not become effective until on and after the first day of September, 1928.

Thereafter, and within due time, a motion for a rehearing and a new trial was overruled by said Court of Appeals, and thereafter proceedings in error were instituted in the Supreme Court of Ohio by The Ohio Electric Power Company to review the proceedings and judgment in ouster of said Court of Appeals, and, as indicated in the bill of complaint filed herein, the Supreme Court of Ohio reviewed the said proceedings and judgment in ouster of said Court of Appeals, and after due and prolonged consideration, on the twelfth day of June, 1929, affirmed said judgment and issued a mandate to said Court of Appeals to carry said judgment and order of ouster into execution.

On July 30, 1927, the Director of Public Service of the City of Norwalk, acting by and through M. G. Irvin, superintendent of the light and water department, served notice upon the local telephone company, by letter of that date (Plaintiff's Exhibit 62) to remove twenty-one poles "located on the south side of West Main Street, from Church Street to the pole approximately two hundred feet west of Pleasant Street." Some or all of these poles were also used by The Ohio Electric Power Company. The notice purports to have been served in accordance with the ordinance of July 1, 1924. The telephone company took no action to remove the poles as requested. There was at that time an agreement between counsel for the city and counsel for The Ohio Electric Power Company that the lines, poles, etc., of the latter would not be interfered with by the City of Norwalk pending the litigation already referred to above.

On the night of October 25, 1927, Mr. Irvin, the superintendent, notified workmen employed under him by the City of Norwalk to be on hand during the early hours of the morning of October 26 at the point where the above twenty-one poles were located. When they arrived upon the scene, he ordered them to remove cer-

tain poles and, before they were stopped, nine or ten of these poles were removed, to the great detriment and injury of The Ohio Electric Power Company. Mr. Irvin testified that his reason for proceeding in the above manner was twofold: he claims that the men were too busily engaged on other city work to do this work at any other time, and he testified he feared the opposition of the local telephone company.

Plaintiff in this action was not a party to the quo warranto proceedings in the state court and its right to maintain this action has not been questioned. There can be no doubt that it "is free to maintain the present action unembarrassed by the decree in the other." Old Colony Trust Company vs. Omaha, 230 U. S. 100, 122, 57 L. Ed. 1410, 1419. The latter case cites with approval Louisville Trust Company vs. Cincinnati (C. C. A. 6), 76 Fed. 296 (certiorari denied, 164 U. S. 707) which is to the same effect.

A determination of this case involves a construction of statutes of the State of Ohio, franchise rights granted pursuant thereto and contracts entered into between the predecessor corporations of the plaintiff and the City of Norwalk. It must be determined whether and to what extent, in a case involving diversity of citizenship, this court should follow the decisions of the Supreme Court of Ohio. And if it follows the latter decisions, will it follow the later decisions or those earlier decisions which had established the law when the rights of the plaintiff accrued and attached?

The general rule is stated in Black and White Taxi Co. vs. Brown & Yellow Taxi Co. (C. C. A. 6), 15 F. (2d) 509, at p. 513, where Judge Knappen said:

"It is also the settled rule that, while the decisions of the state courts in construing the Constitution and Statutes of the state, or in passing upon questions of purely local usage, are binding upon the federal courts, unless they conflict with the Federal Constitution or a Federal Statute, or are dealing with rules of general or commercial law, yet when the question is one of general or commercial law, the federal courts, while treating the decisions of the state courts with attention and respect, and (as has been said) with an inclination to follow them so far as persuasive, will nevertheless ultimately exercise their own independent judgment in deciding the cause. This proposition is elementary."

In this case, however, the lien of plaintiff's mortgage attached and had been perfected by May 25, 1925, and plaintiff contends that this case must be decided upon

the law as it was settled by the decisions of the Supreme Court of Ohio at that time, and that this court should not follow the decision of the latter court in Ohio Electric Power Company vs. State, ex rel. Martin, Prosecuting Attorney (1929), 121 O. S. 235, 167 N. E. 877.

Counsel for plaintiff relies upon the case of Louisville Trust Co. vs. Cincinnati (C. C. A. 6), 76 Fed. 296, 300, 302 (certiorari denied, 164 U. S. 707; and approved and followed upon the point here involved in Kuhn vs. Fairmont Coal Co., 215 U. S. 349, 364, 54 L. Ed. 228, 236), a leading case which points out exceptions to the general rule that the federal courts follow the decisions of state courts construing state statutes. The exception to the general rule was involved in Moore-Mansfield Construction Co. vs. Electric Installation Company, 234 U. S. 619, 58 L. Ed. 1503. In that case at page 625 Mr. Justice Lurton said:

"Courts of the United States are courts of independent jurisdiction, and when a question arises in a United States Court as to the effect of a change in decision which detrimentally affects contract rights and obligations entered into before such change, such rights and obligations should be determined by the law as judicially determined at the time the rights accrued. In every such case the Federal Courts, while leaning to the view of the state court as to the validity of interpretation of a law of the state, will exercise an independent judgment, and will not necessarily follow state judicial decisions rendered subsequently. Burgess vs. Seligman, 107 U. S. 20, 33, 27 L. Ed. 359, 365, 2 Sup. Ct. Rep. 10; Loeb vs. Columbia Twp., 179 U. S. 479, 493, 45 L. Ed. 285, 291, 21 Sup. Ct. Rep. 174.

"Under the settled rule it was the *duty* of the court below, when confronted with the question whether appellant had acquired a lien under the Act of 1883, to determine for itself the meaning and scope of that Act, and to declare the rights of that company under the law as it had been judicially determined." * * *

The latest statement of this exception to the general rule was by Mr. Chief Justice Taft, in Tidal Oil Co. vs. Flanagan (1924), 263 U. S. 444, 452, 68 L. Ed. 382, 386. He said, in part:

"In such cases the Federal Courts, exercising jurisdiction between citizens of different states, held themselves free to decide what the state law was, and to enforce it as laid down by the State Supreme Court before the contracts were made, rather than in later decisions. They did not base this conclusion on Article 1, Section

10, of the Federal Constitution, but on the state law as they determined it, which, in diverse citizenship cases, under the third article of the Federal Constitution, they were empowered to do. Burgess vs. Seligman, 107 U. S. 20, 27 L. Ed. 359, 2 Sup. Ct. Rep. 10. In such cases, as a general rule, they, in the interest of comity and uniformity, followed the decisions of state courts as to the state law; but where gross injustice would otherwise be done, they followed the earlier rather than the later decisions as to what it was." * * *

See also Note 40, L. R. A., N. S., 380, at page 396.

Invoking this well-settled rule plaintiff relies upon Hardin-Wyandot Lighting Company vs. Upper Sandusky (1916), 93 O. S. 428, 113 N. E. 402, as affirmed (1919) in 251 U. S. 173, 64 L. Ed. 210, and the cases cited in that opinion of the Supreme Court of Ohio. In the opinion of this court if the latter cases were determinative of the rights of the plaintiff at the time its lien attached, it is under the foregoing authorities the clear duty of this court to follow these earlier decisions rather than a later decision of Ohio Electric Power Company vs. State, ex rel. Prosecuting Attorney (1929), supra, even though, as ably argued by defendant's counsel, the latter decision is the correct exposition of the law of this state.

Plaintiff claims that the franchise rights of The Ohio Electric Power Company, its mortgagor, depend upon direct grants from the State of Ohio to predecessor corporations of said mortgagor company. The grants relied upon are those by the State of Ohio to The Incandescent Light & Power Company in 1891, and to The Northern Electric Company in 1895. Defendant claims that the franchise rights of plaintiff's mortgagor were derived by and through, and only by and through a grant from the City of Norwalk by a twenty-year franchise evidenced by the ordinance of October 7, 1890 (Exhibit 35) which, may have been extended by the two street-lighting contracts entered into September 1, 1895 (Exhibit G), and September 1, 1905 (Exhibit H). The latter contract expired August 31, 1915; and the defendant claims that, at the latest, the right of plaintiff's mortgagor and its predecessor corporations to occupy the streets, &c., of the City of Norwalk terminated upon the latter date, both because of the time limit of said contract (Exhibit H) and the express terms of Paragraph 14 of that contract.

The legislative grants relied upon by plaintiff and and the ordinance of the City of Norwalk were granted between the years 1887 and 1896. Franchises granted to lighting and power companies between the above years,

because of the statutes in force only during that period, have a unique standing and constitute a separate class among the franchises granted pursuant to the laws of this state. To understand the decisions relied upon, it is necessary to have clearly in mind the statute of 1886 and the statutes in force between 1887 and 1896, and the relation of these statutes to each other.

Because a later controlling statute is supplementary to the statutes relating to magnetic telegraph companies as found in the Revised Statutes of 1880, it is necessary to begin this review of the statutes by considering certain of the latter statutes. Title II of the Revised Statutes of 1880 related generally to the subject of corporations. Chapter I related to "Creating of Corporations and General Provisions." Chapter IV related to "Magnetic Telegraph Companies." The remaining fifteen chapters of Title II related to special kinds of corporations. Chapter IV, relating to "Magnetic Telegraph Companies," consisted of Sections 3454 to 3471, inclusive. The statutes of 1880 which it is necessary to have in mind are Sections 3454, 3461 and 3471. They are as follows:

"Sec. 3454. A magnetic telegraph company heretofore or hereafter created may construct telegraph lines, from point to point, along and upon any public road, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires; but the same shall not incommode the public in the use of such road."

"Sec. 3461. When any lands authorized to be appropriated to the use of a company are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they can not agree, or the municipal authorities unreasonably delay to enter into any agreement, the Probate Court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, *so as not to incommode the public in the use of the same;* but nothing in this section shall be construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness."

Sec. 3471. The provisions of this chapter shall apply also to any company organized to construct any

line or lines of telephone; and every such company shall have the same powers, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies."

There was no provision in the Revised Statutes of 1880 relating to electric light and power companies (Lighting Co. vs. Upper Sandusky, 93 O. S. 428, 438).

On May 12, 1886 (83 O. L. 143), the legislature passed an act (1) authorizing electric light and power companies to construct their lines

"* * * * for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places of such city, village or town, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires, *with the consent of the municipal authorities of the city, village or town, and under such reasonable regulations as they may prescribe.*"

(Formerly Revised Statutes of 1890, Section 8752; now General Code, Section 9195.)

It is the claim of the defendant in this case that the ordinance of the City of Norwalk enacted October 7, 1890, was passed pursuant to power vested in the city council by the above statute, and that by taking an assignment of rights under that ordinance, the franchise rights of the Ohio Electric Power Company were limited as to time by the terms of that ordinance.

On January 26, 1887 (84 O. L. 7), the legislature enacted an act supplementary to Sections 3454 to 3471 of the Revised Statutes of Ohio of 1880, as follows:

"Section 3471-a. The provisions of this chapter so far as the same may be applicable, *shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares and public places with electric light and power, and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies.*"

The plaintiff claims that the act just quoted by implication repealed the act of May 12, 1886 (83 O. L. 143). The defendant on the other hand claims that there was no repeal of the former act by the latter.

The next general revision of the statutes of the State of Ohio was that of 1890. In those statutes Title II remained in a general way as it was in the Revised

(1) Because of certain contentions this act is set out in full at the end of this opinion.

Statutes of 1880, and Chapter IV bore the heading "Magnetic Telegraph Companies." To these was added Section 3471-a, which was the act of January 26, 1887 (84 O. L. 7), just referred to. Sections 3454 and 3461 of the Revised Statutes of 1890 remained identical with statutes bearing those numbers in the Revised Statutes of 1880.

The act of May 12, 1886 (83 O. L. 143), upon which the defendant in this case strongly relies, became Sections 8752 and 8753 of the Revised Statutes of 1890. There having been no express repeal of this act by the legislature, the same was carried verbatim into Part Fifth of the Revised Statutes of 1890, which was the "Uncodified" part of the Revised Statutes of 1890.

Thus the statutes stood at the time of the passage of the ordinance of October 7, 1890, and the incorporation of The Incandescent Light & Power Company and The Northern Electric Company, incorporated respectively in 1891 and 1895, the latter corporations being predecessor corporations of the Ohio Electric Power Company, and through these corporations the latter claims to derive the franchise rights upon which plaintiff relies in this action.

On April 21, 1896 (92 O. L. 204), the legislature enacted an act amending Section 3471-a of the Revised Statutes as enacted January 26, 1887 (84 O. L. 7), as follows:

"Section 3471-a. The provisions of this chapter, so far as the same may be applicable, except section three thousand four hundred and sixty-one, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric light and power, or automatic package carrier; and every such company shall have the same powers, except those given by said section three thousand four hundred and sixty-one, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies. *Provided, however, that in order to subject the same to municipal control alone, no person or company shall place, string, construct or maintain any line, wire, fixture or appliance of any kind for conducting electricity for lighting, heating, or power purposes through the street, alley, lane, square, place or land of any city, village or town, without the consent of such municipality;* and this inhibition shall extend to all levels about and below the surface of any such public ways, grounds or places as well as along the surface

thereof; but this inhibition shall not be applicable to any rights which have heretofore been received and exercised through proceedings of any Probate Court. Any person or company violating any portion of the inhibition aforesaid shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be fined in any sum not less than one hundred and not more than five hundred dollars. The means thus created for enforcing said inhibition shall be held to be only cumulative to any other lawful means open to the municipality by way of injunction or otherwise; and this act shall apply to actions and causes of actions or proceedings named in section seventy-nine of the Revised Statutes, except such as may be pending on error, and not on appeal, in any Circuit Court of the states."

(Now General Code, Sections 9192, 9193 and 9194, the latter section being slightly revised, 101 O. L. 14, and amended 111 O. L. 182.)

The statutory provisions under which plaintiff's mortgagor's predecessor corporations were incorporated and under which the ordinance of October 7, 1890, was granted remained unaffected by any legislation until the passage of the above act of 1896.

It is not claimed that subsequent changes in the above statutes affect the rights of the parties in this action. The sections are now Sections 9170, 9178, 9179, 9191, 9192, 9192-1, 9193, 9194 and 9195 of the General Code of the State of Ohio, Subdivision II, Chapter 2, "Telephone and Telegraph."

It follows from the express terms of these statutes (unless the act of May 12, 1886 (83 O. L. 143), was not repealed by implication by the act of January 26, 1887 (84 O. L. 7)), that cases construing these statutes in cases involving magnetic telegraph companies and telephone companies are alike applicable to lighting and power companies.

What the powers and functions respectively of the state and municipality were under the above statutes (particularly Section 3461 of the Revised Statutes of 1890) first came before the Supreme Court of Ohio in a telephone case: Zanesville vs. Telegraph & Telephone Company, 64 O. S. 67, 59 N. E. 781 (a rehearing of the same case, which came to a contrary conclusion, reported in 63 O. S. 442). The question in that case was whether or not Section 3461 of the Revised Statutes of 1890, in so far as jurisdiction was vested in the Probate Court was unconstitutional, in that it vested legislative power in a court. In arriving at the conclusion that the

statute was constitutional, the court announced among others the following propositions of law in the syllabi and the opinion of the court (Republic Creosoting Co. vs. Boldt Const. Co. (C. C. A. 6), 38 F. (2d) 739, 740):

1. "It is competent for the state through its legislative department to grant to . . phone and telegraph companies organized under its authority, the right to construct their lines in the streets and municipalities" * * *. (Pp. 88 and 89.)

2. That under the express terms of Section 3454 of the Revised Statutes of 1890, corporations incorporated under the above statutes "obtained from the state franchises to construct and to maintain their lines from point to point upon and along any public road or highway * * * subject only to the limitation that the line shall not be so constructed as to incommode the public in the use of the roads and highways," &c. In short, these corporations are granted the right to *use* the streets not by the municipality, but by the state.

3. The only function of the municipality is to agree with the corporation as to the mode of use of the streets, &c., to the end that the public shall not be incommoded in the use thereof. The court said (pps. 80 and 81):

"It will be noticed that it is not the right to use the streets that is made the subject of agreement between the company and the municipal authorities, or of determination by the court. That right, as has been seen, is granted to the company directly by the legislature, and it is not made to depend upon any consent or agreement on the part of the municipality. It is only the *mode* of such use that becomes the subject of agreement or judicial determination."

And page 83:

"The council is given no power to direct in what mode the lines of a telephone company shall be constructed in the streets of a municipality. Its sole province is to come to an agreement with the company in regard to the mode of using the streets by the company. The making of such agreement between the parties is not involved in the proceeding instituted in the court, nor is its action in that regard in any way invoked. The jurisdiction conferred on the court is to determine the controversy between the disputant corporations, arising from their disagreement or failure to agree, by an order binding on both, directing in what mode the telephone lines shall be constructed in the streets and alleys, so as not to incommode the public in the use of the same."

4. The purpose of requiring the consent of the municipality is to the end, only, that the public shall not be incommoded. This appears from quotations from the decision of the court already given, and it follows from the express wording of Section 3461 (R. S. 1890) which applies to the jurisdiction of the Probate Court, which is, "shall be exercised so as not to incommode the public in the use of the same." (To the same effect see Telephone Co. vs. Cincinnati, 73 O. S. 64, at p. 78.)

5. It seems to follow from the language of the court that a municipality may not impair or defeat the franchise grant of the state by insisting upon unreasonable or arbitrary terms as to the mode of use of the streets, &c. The court said (p. 82):

"The statute contemplates that if the mode of using the public ways of cities and villages by telephone companies were left entirely to agreement between the council and company, the franchise of the latter might be made unavailable by the refusal of the former to negotiate with the latter, or by bona fide disagreement of the parties, a contingency not unlikely to occur; and hence, the necessity for the provision of Section 3461, now in question, by which jurisdiction is conferred on a competent court to determine the mode of such use by an order binding on both parties."

Other decisions relied upon by the plaintiff are Farmer vs. Columbiana County Telephone Company (1905), 72 O. S. 526; and Queen City Telephone Company vs. City of Cincinnati (1905), 73 O. S. 64; but these cases are reviewed in the case mainly relied upon by the plaintiff, Hardin-Wyandot Lighting Co. vs. Upper Sandusky (1916), 93 O. S. 428, the latter case involving a lighting and power company.

In the latter case a corporation whose predecessor corporation had been organized and had received an ordinance granted from the Village of Upper Sandusky between 1887 and 1896, had established and maintained a lighting and power plant partly for public street lighting and partly for commercial purposes. Failing to agree with the village on rates for public street lighting, it abandoned that portion of its lines, completely dismantled its street lighting system and rendered itself wholly unable to furnish any electricity whatsoever for the purpose of public lighting (p. 442). Thereafter, without procuring the consent of the village under the act of 1896, above quoted, the company sought to reestablish that portion of its system. The Supreme Court held that the lighting and power company had no right

to re-establish that part of its system without the consent of the municipality; but at the same time the court held that the village had no authority to annul its rights as to the other portion of its system which was devoted to commercial lighting purposes. The case fully reviews and discusses the prior decisions and the legislative acts already quoted in this opinion. The facts of this case are entirely analogous to the facts of the case at bar except in one particular. In that case the predecessor corporation had received an ordinance grant which had no limitation as to the length of time it was to remain in force. In this case the predecessor corporations received assignments of an ordinance grant which was limited to twenty years, originally granted to a partnership but running to the successors and assigns of such partnership. Since, however, this decision (the Hardin-Wyandot case, supra) is based solely upon the extent of the legislative grant, the point that the ordinances involved had different time limits seems to be wholly immaterial.

1. The conclusion which the court reached was based solely upon the character and extent of the rights under the legislative grant to the predecessor corporation of the lighting and power company between 1887 and 1896. While the statement of facts begins (at page 428) with a description of the municipal franchise granted to the predecessor corporation in 1889, it is clear from the opinion that the lighting and power company rested its rights solely upon the legislative grant to "its predecessor" (page 436, also page 439), and because of the incomplete state of the record in error proceedings in the Supreme Court, it did not pass upon the extent of the lighting company's rights under the ordinance. The court said (p. 442):

"However, as pointed out, the ordinance in question here was passed in 1889, while the act of 1887 was still in force. As to the judgment here attacked, inasmuch as neither the agreed statement of facts referred to in the decree of the Court of Appeals nor any other evidence has been brought upon the record by bill of exceptions or entry of the court, we are not able to estimate the force of plaintiff in error's argument with reference to it."

2. The decision of the Supreme Court of the United States, although fully acquiescing in the conclusion of the Supreme Court of Ohio (1a), discusses the

(1a) Hardin-Wyandot Lighting Co. vs. Upper Sandusky, 251 U. S. 173, 64 L. ed. 210.

case as if the decision of the Supreme Court of Ohio, and as if its decision, were based upon the ordinance of 1889; at least no note is taken of the fact that the decision of the Supreme Court of Ohio is based solely upon the character and extent of the legislative grant to the predecessor corporations between 1887 and 1896. It may be assumed that the point as to whether or not the rights of the municipality rested upon the municipal ordinance or the legislative grant was not regarded as vital or controlling in the Supreme Court of the United States because the result in that court would have been the same whether the grant was from the municipality or from the legislature. There was "no limitation as to the length of time" in the municipal ordinance (93 O. S. 429), and, under the holdings of the Supreme Court of the United States, such an ordinance would have been a perpetual franchise. Northern Ohio Traction and Light Company vs. Ohio, 245 U. S. 574, 62 L. Ed. 484. It was important to rely upon and stress the legislative grant in the state courts because under the Ohio rule the ordinance would have been indeterminate, merely, extending only so long as the parties agreed thereto. East Ohio Gas Co. vs. Akron, 81 O. S. 33, 90 N. E. 40.

3. As to the act of January 26, 1887 (84 O. L. 7), it was said (p. 439):

"This act did not repeal the act of May 12, 1886, supra, in express terms, but when the two acts are construed together it is clear that it was the intention of the legislature to confer upon electric light companies 'the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies.'" * * *

And paragraph 1 of the syllabus, which was concurred in by all of the judges (6 O. S. Rule 6, page V) is as follows:

"The act of January 26, 1887 (84 O. L. 7), made applicable to electric light and power companies the provisions of the chapter relating to magnetic telegraph companies, so far as practicable, and while said act remained in force the power of such companies to occupy the streets of a municipality was derived from the state."

If the light and power company involved in that case had power to maintain its plant as established without further consent of the municipality except perhaps as to extensions and enlargements, the same must be true of the Ohio Electric Power Company involved in this case,

if the Hardin-Wyandot case, supra, is to be followed, and, under the authorities, it must be followed.

4. The effect of the decisions is that the act of 1896 (92 O. L. 205), was a valid exercise of the police power. The Supreme Court of Ohio said:

"The purpose of the act of 1896, now Sections 9192, 9193 and 9194, General Code, *was to invest the municipality itself with power to make the grant.* It specifically excepts the provision of Section 3461, Revised Statutes, and it expressly provides that in order to subject the same to municipal control alone, no company shall place electric wires for lighting, heating or power purposes in the streets of the city or village without the consent of such municipality. The elimination of Section 3461, Revised Statutes, and the use of the word 'alone' abrogate the power of the Probate Court to act in such cases, and this is followed by the express provision requiring the consent of the municipality."

The Supreme Court of the United States said (251 U. S. 177, 178, 64 L. Ed. 213):

"From this state of the record we conclude that the State Supreme Court did not intend to deal *with the right of the company to maintain, repair, or replace such poles and wires as it was using for commercial lighting when the case was commenced*, but that its injunction was intended to prohibit restoring of the street lighting poles and wires which had been taken down and all new additional construction 'until the consent of said village shall have been obtained'; and, so restrained, its judgment will be affirmed, based, as it is, upon the statute of 1896, which the court holds, upon abundant reason and authority, was passed in a reasonable exercise of the police power of the state."

Without discussing the character and extent of the rights of the Ohio Electric Power Company under this decision it had at the time of the commencement of this action a present right (2) to maintain its lighting system

(2) Throughout the case plaintiff has claimed that the Ohio Electric Power Company as a "perpetual" franchise. The court does not think it necessary to decide whether the rights of the Ohio Electric Power Company are "perpetual," or whether it "had a present right to occupy the streets at the time of the commencement of this action." See State, ex rel. Taylor, vs. Columbus Ry. Co., 73 O. S. 363, affirming 1 O. C. C., N. S., 145, and quoted in Northern Ohio T. & L. Co. vs. Ohio, ex rel. Pontious, 245 U. S. 574, 584, 62 L. ed. 481, 488. Whether the Ohio Electric Power Company had one right or the other, the plaintiff had a right to maintain this action. If the last cited case, and Ohio Public Service Co. vs. Fritz, 274 U. S. 12, apply, as claimed by plaintiff, then its franchise may be "perpetual." On the other hand plaintiff's claims are based upon a legislative grant and under the Con-

for commercial purposes in the City of Norwalk, and to continue to use the streets of that city for that purpose "with the right of the company to maintain, repair or replace such poles and wires as it was using for commercial lighting when the case was commenced." Hardin-Wyandot Lighting Co. vs. Upper Sandusky, 251 U. S. 173, at page 177, 64 L. Ed. 210, at page 213. The predecessor companies of the Ohio Electric Power Company had agreed upon a mode of use of the streets of the City of Norwalk as early as the year 1890, and, there being no evidence to the contrary, it must be assumed that that mode of use was of such a character that the public has not been incommoded in the use of the streets up to the present time, unless the changes requested by the city under the ordinance of July 1, 1924, which were complied with by the company, were intended to, and did, bring about a mode of the use of the streets which does not now incommode the public. The Ohio Electric Power Company is therefore, under the Hardin-Wyandot case, entitled to continue to use the streets of the City of Norwalk and to maintain its commercial lighting system for that purpose unless one or more of the contentions of the city are well taken.

1. It is claimed on behalf of the City of Norwalk that during the period between the years 1887 and 1896, the City of Norwalk, under the Act of 1886, which was not expressly repealed, had full power and authority to grant a franchise for lighting purposes; that it did in fact grant such a franchise by the ordinance of October 7, 1890, which expired October 7, 1910; and that the only right which the predecessor companies of the Ohio Electric Power Company had was to occupy such streets under the above ordinance franchise; except that the grant may have been extended by implication by Exhibits G and H, which were the two lighting contracts entered into for periods beginning September 1, 1895,

---

stitution of Ohio (1851), the legislature may have the reserve power to alter, revoke or amend the legislative grant. The constitutional provisions are quoted in Hamilton Gas, Light & Coke Co. vs. City of Hamilton, 146 U. S. 258, 269, 270, 36 L. ed. 963. What is here said is consistent with the comment in East Ohio Gas Co. vs. City of Cleveland, 106 O. S. 489, 504, 505, 140 N. E. 410, 414.

And see State, ex rel., vs City of Hamilton, 47 O. S. 52, 75, 76; and see especially the dissenting opinion of Judge Jones in State, ex rel., vs. Traction Company, 93 O. S. 466, 471, reversed in Northern Ohio T. & L. Co. vs. Ohio, ex rel., Pontius, 245 U. S. 574, 62 L. ed. 481.

It is unnecessary to decide, and the court has no intention of deciding, whether the Legislature has the claimed reserve power to alter, revoke or amend, or the effect the exercise of such claimed power would have under the facts of this particular case.

and September 1, 1905, the latter expiring on the 31st day of August, 1915. The contention ignores entirely the fact that the predecessor corporations, The Incandescent Light & Power Company and The Northern Electric Company, organized respectively in 1891 and 1895, received the right to occupy the streets of Norwalk for lighting purposes for an unlimited time, except as power resided in the legislature under constitutional provisions to alter or amend the law; and that the ordinance had no vitality under the decisions already discussed except insofar as it amounted to a consent to a mode of use which should not incommode the public (3). The predecessors of the Ohio Electric Company by the terms of the statute had a right to occupy the streets of Norwalk for an unlimited time the moment they were created, and before they had power to take an assignment of the ordinance. It seems entirely reasonable and logical to say that a corporation holding a grant for an unlimited time direct from the legislature would in no way cut down those rights by taking an assignment of an ordinance purporting to make a twenty-year grant, such grant being from a municipality which received its power to make the grant from the same legislature, but which

---

(3) It is claimed in the briefs for the defendant, and stated in the Zanesville case (page 80) that the proceeding in the Probate Court under Section 3401, after failure of the company and municipality to agree, is an "appropriation proceeding." If seemingly contrary to the above, the real purpose of the agreement between the company and the municipality is, as indicated in the opinions of Judge Spear, in Farmer vs. Telephone Company, 72 O. S. 526, 542, and Telephone Company vs. Cincinnati, 73 O. S. 64, 81, that the municipality may exercise its statutory right of control, care and supervision of the streets (now Section 3714, General Code), is it not the police power that is involved, and in the language of Mr. Justice Pitney, in Atlantic Coast Line vs. Goldsboro Company, 232 U. S., 548, at page 558:

> "It is settled that neither the 'contract clause' nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away and is inalienable, even by express grant; and that all contract and property rights are held subject to its fair exercise."

In that view of the matter, was the agreement of the city contained in the ordinance of October 7, 1890 (Exhibit 35), binding upon the city for any purpose? Was it more than an initial exercise of the police power by the municipality effective until the municipality indicated that a different mode of use would be necessary and required? Must it not be assumed in this case that the mode of use initially indicated by the municipality was satisfactory, at least, until the passing of the ordinance of July 1, 1924 (Plaintiff's Exhibit 38)? The latter ordinance, applying to all companies, similarly situated, was an exercise of the police power. It was in every instance, upon request, complied with by The Ohio Electric Power Company and its predecessors (Exhibits 51 to 69, inclusive).

grant was wholly ineffectual except as it amounted to a consent to a mode of use.

2. It is contended on behalf of the City of Norwalk that under the holding of the Supreme Court of the United States in Bankers Trust Company vs. Raton, 258 U. S. 328, the predecessors of The Ohio Electric Power Company were estopped to claim a grant extending beyond the period of twenty years after the seventh day of October, 1910. In that case there were two statutes, an earlier one empowering cities to regulate waterworks if authorized by a majority of the voters or to grant the right to private individuals for a term not exceeding twenty-five years. There was also a later statute providing for the incorporation of water companies to supply water to municipalities, with power to occupy the streets of a municipality perpetually, subject to regulation by the municipal authorities. The company entered the municipality under an ordinance ratified by the citizens limiting its term to twenty-five years. It was held that the company was estopped by the muncipal ordinance from claiming a perpetual franchise under the later statute.

Many grounds for distinguishing this case have been suggested by counsel for the plaintiff in this case, but it seems unnecessary to consider them at length. It seems sufficient to say that none of the "conventional elements" of equitable estoppel are present here. It cannot fairly be said that there was any reliance by the city or any misleading by any of the companies. It is undisputed that about September 1, 1905, when the ordinance had at least five years more to run, the city entered into a new street lighting contract (Exhibit H) with the company. That street lighting contract did not expire by its terms until August 31, 1915, practically five years after the expiration of the ordinance of October 7, 1890 (Exhibit 35). In fact the city relied exclusively on the predecessors of Ohio Electric Power Company for electricity for all purposes until the municipal plant was established in about 1915. Further, no suggestion was ever made that the company had misled the city as to the extent of its rights. On the contrary, on July 1, 1924, the city passed an ordinance regulating the use of its streets by the Ohio Electric Power Company and all other companies similarly situated, and in many instances (see Exhibits 51 to 69, inclusive) demanded and received compliance with this ordinance. The city is far from being in the position that the city was in the Raton case, where an estoppel was claimed prior to or immediately upon the expiration

of the ordinance there involved. Here the claim is being made nearly twenty years after the expiration of the ordinance which it is claimed operated as an estoppel, and after the city had dealt with the company as already indicated.

3. It is claimed that by the terms of the last street lighting contract, dated April 13, 1905 (see defendant's answer, paragraph 21), which was entered into between the City of Norwalk and The Cleveland & Southwestern Traction Company, a predecessor of plaintiff's mortgagor (Exhibit H), the franchise rights of plaintiff's predecessor were waived and terminated. Reliance is placed upon the last paragraph of Paragraph 14, which is as follows:

"The said contractor, at the expiration of this contract, shall *upon the request of the city,* remove all poles, posts, lamps, wires and other apparatus or material of every kind or description from the streets, alleys and other places in said city, and restore said streets, alleys and other public places in as good condition as the same may be at the time of such removal, and in default thereof after thirty days' notice from said city the same may be done by said city or its agents and said contractor shall pay to said city all costs and expenses thereby incurred."

The contention is that this provision of the contract was intended to and did terminate the *franchise* rights of the Ohio Electric Power Company, and that from and after August 31, 1915, the Ohio Electric Power Company and its predecessors had no right whatsoever to occupy the streets of the City of Norwalk. It is admitted that during the entire time that this company and its predecessors occupied the streets of the City of Norwalk they furnished the street lighting for the city. This service therefore began about October 7, 1890, and extended for a period of about twenty-five years, to about August 31, 1915, all as a result of Exhibits 35, G and H; that practically no new poles, lines or equipment were added as a result of the contract dated April 13, 1905 (Exhibit H); and that during the period of the contract the company continued its lines and its equipment as it had theretofore maintained them (see Paragraph 10 of defendant's answer herein).

At the time of entering into this contract and for some years prior thereto the company had also been operating a commercial lighting system, as it is now operating the same, and it seems that a reasonable construction of this contract must be that it was intended to

deal with and dealt only with the public street lighting feature of the lighting company's business, and that it dealt only with the removal of new poles, posts, lamps, wires and other apparatus, installed for the purpose of carrying out the contract if any such were installed. There was no attempt to deal with the *franchise* rights of the company. If this contract were enforced at this belated time, the most that could be claimed for it would be that the company be required to remove poles, posts, lamps and wires, &c., which had been erected for the maintenance of its street lighting system to the end that the municipal plant of the City of Norwalk might take over this business.

But a more conclusive reason for holding that this contract does not affect the rights claimed by the plaintiff is that the contract purports to grant a right "at the expiration of this contract shall upon the request of said city." It seems to this court that this granted an option merely to the city which it was required to exercise at the time of the expiration of the contract or within a reasonable time thereafter. That the contract granted an option to the city seems to follow from the fact that the company was not required to act unless requested to do so by the city. If it had been the intention of the parties that the company surrender its *franchise* rights and be required to entirely vacate the streets for all purposes, including commercial lighting, at any time after the expiration of the contract, plain language indicating such an intent and purpose would have been chosen by the parties.

The right to the city was to make this request "at the expiration of this contract" and the court is therefore constrained to hold that such request should have been made upon the expiration of the contract or within a reasonable time thereafter, and that the city has waived any right which it had under the contract by delaying its request until about the year 1926 (about eleven years later), when ordinances or resolutions of the council for that purpose were enacted. 13 C. J. 630, Note 65; 4 Page on Law of Contracts, page 3553, Section 2054; 4 Page on Law of Contracts, page 3646, Note 29; 2 Williston on Contracts, Section 853, Note 95. The court would be constrained so to hold even if it had been shown in the evidence that the bondholders had notice of this contract (Exhibit H) and its provisions or were charged with notice thereof.

Although counsel claim that the resolutions of council (Plaintiff's Exhibits Nos. 41, 42 and 45), upon which

the action in the quo warranto proceedings in the state court were based, had reference to this contract, the resolutions do not show that fact. The gist of the petition in the Court of Appeals of Huron County may be gathered from the following paragraph:

"That said defendant has assumed and used and is now using said franchise rights and privileges as above enumerated, the same not having been granted to it by lawful authority and without the consent or authority of the plaintiff, the State of Ohio or the City of Norwalk."

It is claimed by the plaintiff here that not having specifically relied upon the contract in the resolutions adopted by the municipality, it is now estopped from relying thereon; citing Spitzer vs. Board of Trustees (C. C. A. 6), 267 Fed. 121; and Railroad Company vs. McCarthy, 96 U. S. 267, 24 L. Ed. 693.

4. The claim is made that because certain bonds were issued and sold after the commencement of the quo warranto proceeding in the state court, the court is bound to follow the later decision of the Supreme Court of Ohio in Ohio Electric Power Co. vs. State, supra, and not the earlier decision in Hardin-Wyandot Light Company vs. Upper Sandusky, supra. While it appears that the bonds subsequently issued were issued pursuant to the terms of the mortgage and supplemental mortgage (Exhibits 28 and 29), and that the same were in payment of bonds issued before the commencement of the quo warranto proceeding, it is not claimed that the mortgage lien which is sought to be enforced by the plaintiff was released or affected in any way. Accordingly the present bondholders are entitled to and in equity occupy the same position as the earlier bondholders. 3 Thompson on Corporation, 3rd Edition, Section 2343, Section 2403; Louisville Trust Company vs. Cincinnati (C. C. A. 6), 76 Fed. 296, 300; Farmers Loan & T. Co. vs. Meridian Waterworks Co., 139 Fed. 661, 670. Whether the law of the State of New York (Hill vs. Beebe, 13 N. Y. 556; Feldman vs. Beier, 78 N. Y. 293; In re Utica Nat. Brewing Co., 154 N. Y. 268, 48 N. E. 521) or the law of the State of Ohio (Riegel vs. Belt, 119 O. S. 369, 378, 379, 164 N. E. 347, 350) is applicable, there was no payment or discharge of the mortgage now relied upon.

5. It is also claimed that this action should be dismissed because of the failure to join a necessary party defendant, to-wit: the State of Ohio, and the contention is based in part upon the fact that the quo warranto proceeding in the state court was conducted in the name of

the State of Ohio upon relation of the Prosecuting Attorney of Huron County. It does not follow, however, that because the quo warranto proceeding was begun in the name of the State of Ohio it had any interest in the proceeding. A quo warranto proceeding in Ohio is the only one which is appropriate in certain instances and, anomalously, it must always be begun in the name of the State of Ohio, which may have no interest whatsoever therein. It appears that in this case the State of Ohio has no interest whatsoever in this action. The Executive Department of the State of Ohio is not interested, and the Legislative Department, which may have reserve power to alter or to repeal the legislative grant, has not acted. The proceeding was begun not upon the initiative and suggestion of the State of Ohio or any of its officers, but as a result of a resolution of the council of the City of Norwalk (Exhibit 45) passed on the 18th day of May, 1926, requesting the Prosecuting Attorney of Huron County to begin ouster proceedings. They were begun and maintained under the auspices of counsel employed by the City of Norwalk solely for that purpose. Clearly the State of Ohio was neither a necessary nor a proper party to this action. (See also Exhibits 40 and 44.)

The court is not impressed with the explanation offered by Mr. Irvin, the superintendent, for proceeding surreptitiously and practically in the nighttime in removing nine or ten poles on the early morning of October 26, 1927. His testimony shows that he was in close touch with the situation, and he must have known of the agreement of counsel that there should be no interference with the property of the Ohio Electric Power Company pending the litigation in the state courts. He was and is keen to prevent competition with the city on the part of the Ohio Electric Power Company in the commercial lighting business in the City of Norwalk. The court is of the opinion that, unless restrained and enjoined by this court, there will be further interference with the property of The Ohio Electric Power Company pending litigation in the Federal Courts. The situation and feeling evidenced by the acts and conduct of Mr. Irvin have not been aided or allayed by the litigation in this court. The plaintiff is entitled to an injunction which, it is hoped, will prevent similar acts and a repetition of like conduct on the part of the city.

Entertaining the above views, this court has found it unnecessary to consider the effect of later decisions of the Supreme Court of Ohio, such as Ohio Service Co. vs.

State, ex rel., 113 O. S. 325 (June 2, 1925); reversed, 274 U. S. 12, 71 L. Ed. 899.

The court has also found it unnecessary to consider the effect of a series of conferences had in the fall of 1914 between the officials of the City of Norwalk and the officials of the Cleveland, Southwestern & Columbus Railway Company, some of them pertaining to meetings of the City Council of the City of Norwalk, and the effect of an initiative petition presented to the electors of the City of Norwalk, in October, of 1926, by The Ohio Electric Power Company. It seems to the court that neither the city nor The Ohio Electric Power Company was in any way estopped by their acts and conduct in asserting their legal rights as the court in this opinion finds them to exist; however, if either party desires further findings of facts, they should be formulated pursuant to Rule 34 of this court, and in accordance with Equity Rule 70½ of the Supreme Court of the United States; and in that connection the court calls the attention of counsel to the case of Lester Briggs vs. United States (C. C. A. 6), 45 Fed. 2d 479, decided December 11, 1930.

It is to be regretted if the conclusions of this court seem to conflict with those of the Supreme Court of Ohio in Ohio Electric Power Co. vs. State, 121 O. S. 235. However, if they do so conflict, this court is bound to follow the decisions of the Supreme Court of the United States, and of the Circuit Court of Appeals for the Sixth Circuit. It is to be noted also that the plaintiff in this action was not made a party to the proceeding in the state court, and its rights and equities were not brought to the attention of that court. No decision has been called to the attention of this court which indicates that the Supreme Court of Ohio, upon a showing of plaintiff's rights, would not have, under its prior decisions, continued the franchise rights of the Ohio Electric Power Company until the obligations of that company to its bondholders had been discharged and satisfied. (4)

---

(4) And it is not unlikely that the decision of the Supreme Court of Ohio would have been in favor of the utility upon the vitally different record made in this case. That court's decision to a large extent is based upon the fact that no agreements other than the Ordinance of 1890 and the street-lighting contracts of 1895 and 1905 were ever entered into with reference to the use and occupancy of the streets. That court said (121 O. S., at page 239):

> "Concededly no franchise was ever granted and no agreement with reference to the use and occupancy of the streets ever entered into except as hereinbefore stated." * * *

In this case the answer of the defendant admits the enactment of the Ordinance of July 1, 1924 (Plaintiff's Exhibit No. 38), which is still in full force and effect. It applies to the Ohio Electric Power

An order may be entered accordingly and, in part, along the lines of the order entered in Old Colony Trust Company vs. City of Omaha, 230 U. S. 100, a certified copy of that order being in the hands of counsel.

Geo. P. Hahn,
Judge.

February 7, 1931.

|83 Ohio Laws, page 143, Act of May 12, 1886:

"AN ACT

to authorize the construction of lines for conducting electricity for light and power purposes and the contracting by municipalities for lighting streets, and other public places with electricity.

"Section 1. *Be it enacted by the General Assembly of the State of Ohio,* That a company organized for the purpose of supplying electricity for power purposes, and for lighting the streets and public and private buildings of a city, village or town, may manufacture, sell and furnish the electric light and power required therein for such and other purposes, and such companies may construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places of such city, village or town, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires, with the consent of the municipal authorities of the city, village or town, and under such reasonable regulations as they may prescribe. Provided, that all wires erected and operated under the provisions of this act shall be covered with a water-proof insulation, and said poles, piers, abutments and wires shall be so located and arranged as not to interfere with the successful operation of existing telegraph and telephone wires.

"Section 2. The municipal authorities of any city, village or town, in which any electric light company is organized, may contract with any such company for lighting the streets, alleys, lands, lanes, squares and public places in such city, village or town.

"Section 3. This Act shall take effect and be in force from and after its passage."

Company, and, as already noted, the city demanded and received full compliance with the ordinance on the part of the utility. The ordinance is tantamount to a consent to the use of the streets by the City of Norwalk. The record in the case in the Supreme Court of Ohio shows that the ordinance was never called to the attention of that court.

PERMANENT INJUNCTION
(Filed June 27, 1931)

This cause came on to be heard upon the bill of complaint, the amendment and supplement to bill of complaint, the second amendment and supplement to bill of complaint, and the third amendment and supplement to bill of complaint of the plaintiff, The Chase National Bank of the City of New York, it having been substituted as plaintiff herein for The Equitable Trust Company of New York, the original plaintiff, and the answer of the defendant, City of Norwalk, Ohio, to the bill of complaint, amendment and supplement to the bill of complaint and second amendment and supplement to the bill of complaint and upon the answer of said defendant to the third amendment and supplement to the bill of complaint, and the evidence, and was argued by counsel. Upon consideration whereof the court finds that the plaintiff is a citizen and resident of the State of New York, and defendant is a citizen and resident of the Western Division of the Northern Judicial District of Ohio, and that the amount involved herein, exclusive of interest and costs, exceeds the sum of Five Thousand Dollars ($5,000.00); that the bill of complaint and the several amendments and supplements thereto state a cause of action in equity, and that the State of Ohio is not a necessary party to this action; that the Ohio Electric Power Company, for the purpose of protecting, preserving and enforcing the lien of the mortgage and supplemental mortgage to plaintiff, is and was at the time of filing the bill of complaint herein the owner of all rights and franchises originally acquired in 1891 by The Incandescent Light and Power Company and in 1895 by The Northern Electric Company, respectively, by grants from the State of Ohio, and that the rights and franchises so acquired by said companies were to occupy and use the streets, alleys and public places of the City of Norwalk, Ohio, for the purposes of constructing, maintaining and operating poles, wires, and other necessary fixtures and electrical equipment therein for the distribution of electric current to the City of Norwalk, and the inhabitants thereof, for public, domestic and commercial light, heat and power purposes, in perpetuity as against any rights or power of the City of Norwalk, Ohio, with reference thereto but without prejudice to the right of said city to require such reasonable mode of use of said streets, alleys and public places as shall be agreed upon between the municipal authorities of said

city and the Ohio Electric Power Company and its successors, which will not incommode the public in the use thereof, or to make reasonable regulations as to such mode of use as to both the existing system and future extensions thereof, in the exercise of the police power (the question as to whether the Probate Court has power and jurisdiction to determine the mode of use in event of disagreement as to mode of use between the city and the holders of the franchises is not at this time involved in this case and is not decided), and said rights and franchises being subject otherwise to no limitations in time, except only by the exercise of such powers, if any, as may exist in the General Assembly of the State of Ohio to amend or repeal said franchise rights; but the question as to the existence of any such power in said General Assembly not being before the court is expressly not decided; that the plaintiff has a good and valid lien upon all of said franchise rights and upon all the physical properties of the Ohio Electric Power Company in the City of Norwalk, Ohio, which lien has existed since May 25, 1925; that said franchise rights and physical properties will be destroyed and rendered worthless, and that great and irreparable loss or damage will result to the plaintiff unless a permanent injunction is granted herein, as prayed for by plaintiff, and that the plaintiff has no adequate remedy at law.

It is, therefore, ordered, adjudged and decreed that as long as The Chase National Bank of the City of New York, plaintiff, or its successors in trust, or the holders of bonds heretofore issued secured by the mortgage and the supplemental mortgage thereto, described in the bill of complaint, or any person, firm or corporation claiming by, through or under them, or either of them, have as such any interest in the properties and franchises described in the bill of complaint and the several amendments and supplements thereto herein, and as long as any holders of mortgages or bonds executed and delivered in payment of or substitution for, or in refunding or extension of said mortgage and supplemental mortgage or of bonds heretofore issued thereunder shall have any interest in or lien upon said properties and franchises, the said defendant, City of Norwalk, Ohio, its attorneys, officers, officials, agents, employes and representatives, and all persons whomsoever to whom notice of this order shall come, be, and they are severally and collectively hereby enjoined and restrained from in any manner interfering with or interrupting the full exercise of any and all of said franchise rights of the Ohio Elec-

tric Power Company as hereinbefore found and the continued operation of the existing plant and electrical distribution system of the Ohio Electric Power Company in the streets, alleys or other public places of the City of Norwalk, Ohio, and from taking any steps, or doing any act to dismantle, wreck or remove any part of said existing system from the streets, alleys and public places of said city, and from taking any steps or action of any kind whatever to cause the enforcement or carrying out by the sheriff of Huron County, Ohio, or any of his deputies, or by any other officers of any of the courts in the State of Ohio of the judgment of ouster entered by the Court of Appeals of Huron County, Ohio, in the quo warranto action instituted therein in the name of the State of Ohio on the relation of Edgar G. Martin, prosecuting attorney of Huron County, State of Ohio, decided May 21, 1928, which judgment was affirmed by the Supreme Court of Ohio, on June 12, 1929, and from applying to any of the courts of the State of Ohio for any writ, process or order of any kind whatever for the purpose of enforcing and carrying out said judgment of ouster.

Nothing in this decree shall be interpreted as a finding or decision of the court upon the question of the right of the Ohio Electric Power Company to extend its lines as they exist at the date hereof, the court not finding it necessary to decide that question at this time. The question is therefore reserved and not decided.

It is further considered and ordered that the plaintiff, The Chase National Bank of the City of New York, have and recover of and from the defendant, City of Norwalk, Ohio, its costs herein.

Jurisdiction of this cause is retained by this court for the purpose of taking all action necessary to make this decree fully effective and for the purpose of passing upon the questions reserved and not hereby decided, and either party may apply for further relief at the foot of this decree should occasion arise therefor.

To all of the foregoing the defendant hereby excepts.

Dated this 27th day of June, 1931.

Geo. P. Hahn, Judge.

PETITION FOR APPEAL
(Filed July 25, 1931)

To the Honorable George P. Hahn, District Judge:

The above named defendant, City of Norwalk, Ohio, conceiving itself aggrieved by the decree entered in the above entitled cause on the 27th day of June, 1931, hereby appeals from said decree to the United States Circuit Court of Appeals for the Sixth Circuit for the reasons set forth in the assignment of errors filed herewith, and it prays that its appeal may be allowed and a citation issued as provided by law, and that a transcript of the record, proceedings, papers, and exhibits necessary to said appeal may be duly authenticated and sent to the said United States Circuit Court of Appeals for the Sixth Judicial Circuit.

Rex F. Bracy,
G. Ray Craig,
W. A. Eversman,
Attorneys for the Defendant, the City of Norwalk, Ohio.

Dated July 24, 1931.

ASSIGNMENTS OF ERROR
(Filed July 25, 1931)

City of Norwalk, Ohio, defendant in the above entitled case, says that in the record of proceedings therein there is manifest error and that the District Court for the Northern District of Ohio, Western Division, erred in this, to-wit:

1. In finding and decreeing that the State of Ohio is not a necessary party to this action.

2. In not finding and decreeing that the State of Ohio is a necessary party to this action for the reason that this is an action to enjoin the carrying into effect of an order of ouster rendered by the Court of Appeals of

Huron County, Ohio, in an action in quo warranto brought by the State of Ohio on the relation of Edgar G. Martin, Prosecuting Attorney of Huron County, Ohio, against the Ohio Electric Power Company, plaintiff's mortgagor; and in not dismissing the bill of complaint for such defect in parties defendant.

3. In finding and decreeing that the Incandescent Light & Power Company and the Northern Electric Company by their incorporation under the law of the State of Ohio in 1891 and 1895 respectively, were granted by the State of Ohio the right to occupy and use the streets, alleys and public places of the defendant, City of Norwalk, Ohio, for the purposes of constructing, maintaining and operating poles, wires, and other necessary fixtures and electrical equipment therein for the distribution of electric current to the City of Norwalk, and the inhabitants thereof, for public, domestic and commercial light, heat and power purposes in perpetuity as against any right or power of the City of Norwalk with reference thereto (but without prejudice to the right of said city to require such reasonable mode of use of said streets, alleys and public places as shall be agreed upon between the municipal authorities of said city and The Ohio Electric Power Company and its successors, which will not incommode the public in the use thereof, or to make reasonable regulations as to such mode of use as to both the existing system and future extensions thereof, in the exercise of the police power, the question as to whether the Probate Court has power and jurisdiction as to the mode of use in event of disagreement as to mode of use between the city and the holders of the franchises being considered by the court not to be at this time involved in the case was not decided by the court).

4. In not finding and decreeing that the Incandescent Light & Power Company and the Northern Electric Company by their incorporation under the laws of the State of Ohio in 1891 and 1895, respectively, secured at most the capacity to secure the right to occupy and use the streets, alleys and public places of the City of Norwalk for the purpose of constructing, maintaining and operating poles, wires, and other electrical equipment therein, by entering into an agreement with said city with respect to the mode of use of said streets, alleys, and public places, or, if such agreement could not be secured, by securing an order of the Probate Court of Huron County, Ohio, with reference to such mode of use, and that the right arising from such agreement with the City of Norwalk, or from such order of the Probate Court of

Huron County, Ohio, would be limited in term to the term of such agreement or the term fixed by such order.

5. In finding and decreeing that the ordinance of the City of Norwalk of October 7, 1890, granting to the Norwalk Incandescent Light Company, a partnership, its successors and assigns, for the term of twenty years from the passage of said ordinance, "the right of way through, in, and upon the streets, sidewalks and alleys and the public grounds of said city for the uses and purposes of therein and thereupon erecting and maintaining and using all necessary poles and posts of wood, iron and other suitable material and the necessary wires to successfully operate and use a system of incandescent lighting in said city" upon certain conditions and provisions set forth in such ordinance, constituted an agreement as to the mode of use of the streets, alleys and public places of the City of Norwalk under Revised Statutes of Ohio of 1890, Section 3461, between the City of Norwalk and the Incandescent Light & Power Company and its successor, the Northern Electric Company, successors of the Norwalk Incandescent Light Company, and their successors and assigns, including The Ohio Electric Power Company, plaintiff's mortgagor.

6. In failing to find and decree that said ordinance of the City of Norwalk, dated October 7, 1890, upon acceptance by the Norwalk Incandescent Light Company became a valid contract between said City of Norwalk and said Norwalk Incandescent Light Company granting a right of way in the streets, alleys and public places of the City of Norwalk, limited in term to twenty (20) years, and upon the acceptance of an assignment thereof by the Incandescent Light & Power Company and its successor the Northern Electric Company and their successors, and operation thereunder by said companies, all of the terms and conditions of said ordinance including the limitation of the term thereof became binding upon the Incandescent Light & Power Company, the Northern Electric Company and their successors, including The Ohio Electric Power Company, plaintiff's mortgagor.

7. In failing to find and decree that The Incandescent Light & Power Company and The Northern Electric Company and their successors by accepting an assignment of the rights accruing from said ordinance of October 7, 1890, and the operation thereunder thereby waived all rights to occupy the streets, alleys and public places of the City of Norwalk with electrical distribution equipment which said corporations may have received by incorporation under the laws of the State of Ohio in 1891

and 1895, respectively, and that the plaintiff and its mortgagor, The Ohio Electric Power Company, are now estopped to claim any right to occupy the streets, alleys and public places of the City of Norwalk with electrical distribution equipment as a result of such acceptance of said ordinance by The Incandescent Light & Power Company and The Northern Electric Company and operation thereunder by said companies, alleged by the plaintiff to be its predecessors in title.

8. In failing to find and decree that the Act of April 21, 1896 (92 Ohio Laws 204, Revised Statutes 3471-A), revoked such capacity and right as the predecessors of The Ohio Electric Power Company may have had to enter upon the streets, alleys and public places of the City of Norwalk, with their electrical distribution equipment or to maintain the same therein beyond the term fixed by the said ordinance of the City of Norwalk of October 7, 1890, without the consent of said city.

9. In failing to find and decree that upon the expiration of the term fixed by the ordinance of October 7, 1890, the right to continue the operation of the electrical distribution system operated by the predecessors in title of The Ohio Electric Power Company under said ordinance other than by consent and grant by the City of Norwalk, Ohio, ceased and was non-existent and that no such consent or grant having been shown by the plaintiff, the plaintiff and its mortgagor, The Ohio Electric Power Company, are without continuing right to occupy the streets, alleys and public places of the defendant, City of Norwalk, with electrical distribution equipment.

10. In finding and decreeing that for the purpose of enforcing, protecting and preserving the liens of the mortgage and supplemental mortgage to the plaintiff herein, The Ohio Electric Power Company, plaintiff's mortgagor, has a continuing right to occupy the streets, alleys and public places of the City of Norwalk with its electrical distribution equipment in perpetuity as against any rights or power of the said City of Norwalk, Ohio, with reference thereto (but without prejudice to the right of said city to require such reasonable mode of use of said streets, alleys and public places as shall be agreed upon between the municipal authorities of said city and The Ohio Electric Power Company and its successors, which will not incommode the public in the use thereof, or to make reasonable regulations as to such mode of use as to both the existing system and future extensions thereof, in the exercise of the police power, the question as to whether the Probate Court has power and jurisdic-

tion as to the mode of use in event of disagreement as to mode of use between the city and the holders of the franchises being considered by the court not to be at this time involved in the case was not decided by the court, and in enjoining any interference by the City of Norwalk with the electrical distribution equipment of The Ohio Electric Power Company in the streets, alleys, and public places of the City of Norwalk upon the basis of such finding of continuing right.

11. In failing to find and decree that the plaintiff and its mortgagor, The Ohio Electric Power Company, are without right to occupy the streets, alleys and public places of the City of Norwalk with the electrical distribution equipment now maintained therein by The Ohio Electric Power Company, or any extensions thereof, and decree that the bill of complaint be therefore dismissed with costs to the plaintiff.

12. In finding and decreeing that the contract dated April 13, 1905, between the City of Norwalk and The Cleveland, Southwestern Traction Company, alleged by the plaintiff to be its predecessor in title, constituted merely an option in the City of Norwalk to require the removal of the electrical distribution equipment of the company upon the expiration of such contract, and that such option not having been exercised within a reasonable time has now expired.

13. In failing to find and decree that the resolution of the council of the City of Norwalk adopted March 23, 1926, requiring The Ohio Electric Power Company to remove from the streets, alleys, and public places of the City of Norwalk its electrical distribution equipment within thirty days thereafter, constituted execution of an option in the City of Norwalk to require the removal of such electrical distribution equipment if such contract of April 13, 1905, between the City of Norwalk, Ohio, and The Cleveland, Southwestern Traction Company constituted merely such option.

14. In finding and decreeing that the provisions of the contract dated April 13, 1905, between the City of Norwalk and The Cleveland, Southwestern Traction Company, alleged by the plaintiff to be its predecessor in title, requiring the company to remove its electrical distribution equipment from the streets, alleys and public places of said city upon the expiration of the ten-year term fixed in such contract were limited in their application to the street lighting equipment of said company, and in not finding and decreeing that such provisions constituted an affirmative obligation upon such com-

pany and its successors to remove all their electrical distribution equipment from the streets, alleys and public places of such city upon the expiration of said term of said contract.

15. In failing to find and decree that the contract dated April 13, 1905, between the defendant City of Norwalk, and the Cleveland, Southwestern Traction Company waived and terminated all rights which such company may then have had to continue to maintain and operate its electrical distribution equipment in the streets, alleys and public places of the City of Norwalk after the expiration of such contract and that plaintiff and its mortgagor, as successors of such company, are bound by such contract and are therefore without right to continue to maintain and operate an electrical distribution system in the streets, alleys and public places of the defendant city.

16. In failing to find and decree that the ordinance of the City of Norwalk, dated July 1, 1924, did not constitute a grant of right to the plaintiff or its mortgagor, The Ohio Electric Power Company, to continue the operation of their electrical distribution system in the City of Norwalk, Ohio, or an agreement between the City of Norwalk and The Ohio Electric Power Company as to the mode of use of the streets, alleys, and public places of the City of Norwalk under Revised Statutes of Ohio of 1890, Section 3461.

17. In failing to find and decree that the City of Norwalk is not estopped to claim and assert that The Ohio Electric Power Company, mortgagor to the plaintiff, is now occupying the streets, alleys, and public places of the City of Norwalk, Ohio, with its electrical distribution equipment without right, grant, or franchise of any kind whatsoever.

18. In failing to find and decree that the Act of May 12, 1886, 62 Ohio Laws 72, was in full force and effect in the years 1890 and 1895, respectively, and that The Incandescent Light & Power Company and The Northern Electric Company, incorporated respectively in such years, could, therefore, secure no rights to occupy the streets, alleys and public places of the City of Norwalk, Ohio, without the consent of said city.

19. In finding and decreeing that the present bondholders of The Ohio Electric Power Company represented by the plaintiff trustee herein were and are entitled to rely and insist upon the interpretation of the statutes and law of Ohio with regard to the nature of and creation of rights to occupy the streets, alleys and

public places of municipalities of Ohio with electrical distribution equipment, between the years 1887 and 1896 as contained in opinions and decisions of the Supreme Court of Ohio prior to the date of the mortgage and supplemental mortgage to plaintiff's predecessor trustee referred to in the bill of complaint and the amendments and supplements thereto, and that the court was required to ignore the interpretations and findings as to such statutes and law, contained in opinions and decisions of the Supreme Court of Ohio after the dates of such mortgage and supplemental mortgage.

20. In finding and decreeing that the case of *Hardin-Wyandot Company vs. Village of Upper Sandusky, 93 Ohio State 426, affirmed 251 U. S. 177,* constitutes a clear and authoritative interpretation of the statutes and laws of the State of Ohio relating to the creation and nature of rights to occupy the streets of municipal corporations of the State of Ohio with electrical distribution equipment between the years 1887 and 1896, and that under such opinion and decision the court was required to find and decree that the plaintiff through its mortgagor, The Ohio Electric Power Company, has a continuing right to occupy the streets, alleys, and public places of the City of Norwalk with the existing electrical distribution equipment of The Ohio Electric Power Company.

21. In failing to find and decree that the District Court is bound by the interpretation of the statutes of Ohio relating to the creation of and the nature of the right to construct and maintain electrical distribution equipment in the streets, alleys, and public places of municipal corporations of the State of Ohio between the years 1887 and 1896 contained in the opinions and decisions of the Court of Appeals of Huron County, Ohio, and the Supreme Court of Ohio in the case of State of Ohio ex rel. Martin vs. The Ohio Electric Power Company as the latest and only clear and authoritative decision upon the subject by the courts of the State of Ohio, and in failing to find and decree that the bill of complaint be dismissed for the reason that under such decision the plaintiff and its mortgagor, The Ohio Electric Power Company, have no continuing right to occupy the streets, alleys and public places of the City of Norwalk, Ohio, with their electrical distribution equipment.

22. In finding and decreeing that the acts and threatened acts of the defendant, City of Norwalk, create a situation entitling the plaintiff to an injunction to prevent irreparable injury and in granting a permanent injunction for such reason.

23. In failing to find and decree that there was no proof of intention upon the part of the defendant, City of Norwalk, to interfere with or destroy the property and rights of the plaintiff or its mortgagor, The Ohio Electric Power Company, by force and violence or by unlawful methods and that the bill of complaint be dismissed for want of equitable jurisdiction.

24. In enjoining the Court of Appeals of Huron County, Ohio, and its officers and agents, from carrying into effect the judgment of ouster entered by such court in the quo warranto action instituted therein in the name of the State of Ohio on the relation of Edgar G. Martin, Prosecuting Attorney of Huron County, Ohio, against The Ohio Electric Power Company in view of the prohibition against such injunction contained in *Title 28, U. S. C. A., Section 379* (*Judicial Code, Sec. 265*).

25. In finding and decreeing that the plaintiff and its mortgagor, The Ohio Electric Power Company, are the successors to any and all rights and capacities to secure rights to occupy the streets, alleys and public places of municipalities of the State of Ohio which were held by The Incandescent Light & Power Company or The Northern Electric Company and their alleged successors in title, The Norwalk Gas & Electric Company, The Cleveland, Southwestern Traction Company, The Cleveland, Southwestern & Columbus Railway Company, The Cleveland, Southwestern Railway & Light Company, and Victor Emmanuel.

26. In finding and decreeing that jurisdiction of the cause was retained by the District Court for the purpose of passing upon questions reserved and not decided by the court, such questions being questions which the court expressly found were not presented to it for decision by the evidence at the hearing of this cause.

27. In finding and decreeing that the prayers of plaintiff's bill of complaint and the amendments and supplements thereto should be granted insofar as an injunction against interference with the existing electrical distribution equipment of The Ohio Electric Power Company was requested.

28. In not finding and decreeing that plaintiff's bill of complaint and the amendments and supplements thereto should be dismissed with a decree that defendant recover of the plaintiff its costs herein.

Wherefore, defendant prays that the decree entered by the District Court herein on the 27th day of June, 1931, may be reversed and that the District Court be ordered to enter a decree dismissing the bill of complaint

and the amendments and supplements thereto, and for such other and further relief as to the court may seem just and proper.

Rex F. Bracy,
G. Ray Craig,
W. A. Eversman,
Attorneys for the Defendant-Appellant.

Dated July 24, 1931.

ORDER ALLOWING APPEAL

(Filed July 25, 1931)

On petition of the defendant in the above entitled cause it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the decree heretofore filed and entered herein be, and the same is, hereby allowed, and that a transcript of the record, proceedings, and papers in this case necessary to said appeal shall be duly authenticated and sent to the United States Circuit Court of Appeals.

It is further ordered that the bond on this appeal be and is fixed at the sum of Five Hundred Dollars ($500.00) to secure the costs on appeal.

Geo. P. Hahn,
District Judge.
Paul Jones,
District Judge.

At Youngstown, Ohio, July 25th, 1931.

Dated July 25th, 1931.

CITATION
(Filed Aug. 7, 1931)

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SIXTH CIRCUIT

To The Chase National Bank of the City of New York, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said circuit on the 22nd day of August next, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Northern District of Ohio, wherein the City of Norwalk is defendant-appellant and The Chase National Bank of the City of New York, having been substituted as plaintiff for the Equitable Trust Company of New York, is plaintiff-appellee, to show cause, if any there be, why the decree rendered against the said City of Norwalk, Ohio, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles Evans Hughes, Chief Justice of the United States, this 25th day of July in the year of our Lord one thousand nine hundred and thirty-one and of the Independence of the United States of America the one hundred and fifty-seven.

Geo. P. Hahn,
Judge of the District Court.
Paul Jones,
Judge of the District Court.

At Youngstown, Ohio, July 25th, 1931.

Service of the above citation is hereby acknowledged and appearance of plaintiff-appellee is hereby entered.

Tracy, Chapman & Welles,
Earl F. Boxell,
Of Counsel for The Chase National Bank of the City of New York, Plantiff-Appellee.

August 6, 1931.

ORDER EXTENDING TIME

(Filed Aug. 11, 1931)

Upon application of the defendant-appellant the time for filing the narrative statement of testimony in the above case is hereby extended to September 4, 1931, and the time for filing the printed transcript of record in the United States Circuit Court of Appeals for the Sixth Circuit is hereby extended to October 4, 1931.

Geo. P. Hahn,
United States District Judge.

Dated August 6th, 1931.

Approved:

Earl F. Boxell,
Of Counsel for The Chase National Bank of the City of New York, Plaintiff-Appellee.

BOND ON APPEAL

(Filed Aug. 24, 1931)

Know All Men By These Presents: That we, City of Norwalk, Ohio, a municipal corporation of the State of Ohio, as principal, and The Fidelity and Casualty Company of New York, N. Y., as surety, are held and firmly bound unto the plaintiff in the above entitled cause in the sum of Five Hundred and no/100 Dollars ($500.00) to be paid to the said plaintiff, its successors and assigns, to the payment of which we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Witness our signatures and seals affixed hereto by our duly authorized officers this 20th day of August, 1931.

Whereas, on the 27th day of June, 1931, a decree was entered in the above entitled cause and the defendant, City of Norwalk, Ohio, has obtaind an order allow-

ing an appeal from said decree to the United States Circuit Court of Appeals for the Sixth Circuit.

Now, the condition of the above obligation is such that if the defendant, City of Norwalk, Ohio, shall prosecute its said appeal to effect and shall answer all costs that may be awarded against it, if it shall fail to make good its plea, then the above obligation to be void, otherwise to remain in full force and effect.

City of Norwalk, Ohio,
By Cort M. Schock, Mayor. (Seal)
F. G. Warner, Auditor.
The Fidelity and Casualty Co.
of New York,
By H. S. Bowen, Attorney.

Approved:
Geo. P. Hahn,
District Judge.

ORDER EXTENDING TIME

(Filed Sept. 5, 1931)

It is hereby ordered that the time within which the defendant-appellant shall lodge its narrative form of testimony with the clerk is extended to and including September 30, 1931, and that the time for the defendant-appellant to complete its record and file the same and for the making of the clerk's return to the citation on defendant-appellant's appeal in this case in the United States Circuit Court of Appeals pursuant to the appeal sued out is extended to and including October 30, 1931.

Geo. P. Hahn,
Toledo, Ohio, 1931. District Judge.

Approved:

.....

Counsel for the Plaintiff-Appellee, The Chase National Bank of the City of New York.

ORDER EXTENDING TIME

(Filed October 15, 1931)

It is hereby ordered that the time within which the plaintiff-appellee may file any exceptions, objections or amendments to the narrative form of testimony lodged with the clerk on September 30, 1931, by defendant-appellant, and for settling and filing the narrative form of testimony be, and the same hereby is enlarged to and including November 10, 1931.

Geo. P. Hahn,
District Judge.

Dated October 15, 1931.

Approved:

W. A. Eversman,
Counsel for the Defendant-Appellant,
City of Norwalk, Ohio.

ORDER EXTENDING TIME

(Filed October 24, 1931)

It is hereby ordered that the time within which the plaintiff shall file its objection to the praecipe for transcript of record on appeal filed this day by the defendant and its counter praecipe is hereby extended to and including November 10, 1931.

It is further ordered that the time for hearing upon the matter of the approval of the statement of evidence is hereby set for November 13, 1931, at 9:00 o'clock A. M., or as soon thereafter as the business of the court permits.

It is further ordered that the time for the defendant to complete its record and file the same and for the making of the clerk's return to the citation on defendant's appeal in this cause in the United States Circuit Court of Appeals, pursuant to the appeal sued out by the defendant is extended to and including November 30, 1931.

Geo. P. Hahn,
District Judge, Toledo, Ohio.

October 24, 1931.

Approved:

Earl F. Boxell,
Of Counsel for The Chase National Bank
of the City of New York.

W. A. Eversman,
Counsel for the City of Norwalk.

ORDER EXTENDING TIME

(Filed November 16, 1931)

It is hereby ordered that the time within which the plaintiff-appellee may file any exceptions, objections or amendments to the narrative form of testimony lodged with the clerk on September 30, 1931, by defendant-appellant, be, and the same hereby is, enlarged to and including November 21, 1931, and the time for hearing upon the matter of the approval of the narrative form of testimony is continued to nine o'clock A. M., November 23, 1931, or as soon thereafter as the court may hear the same.

It is further ordered that the time within which the plaintiff shall file any objections to the praecipe for transcript of the record on appeal filed by the defendant-appellant, and for the filing by plaintiff-appellee of its praecipe for additional portions of the record to be incorporated into the transcript be, and the same hereby is, enlarged to and including November 21, 1931.

It is further ordered that the time for the defendant to complete its record and file the same and for the making of a clerk's return to the citation on defendant's appeal in this case in the United States Circuit Court of Appeals, pursuant to the appeals sued out by the defendant, is hereby extended to and including December 15, 1931.

Geo. P. Hahn,
District June.

Dated November 16, 1931.

Approved:

Earl F. Boxell,
Of Counsel for Plaintiff-Appellee.

AFFIDAVIT FOR PLAINTIFF UPON TAXATION OF COSTS

(Filed November 21, 1931)

State of Ohio, Lucas County, ss.

Earl F. Boxell, being first duly sworn, says that he is one of the attorneys for plaintiff in the above entitled case and is a member of the firm of Tracy, Chapman & Welles, solicitors for plaintiff. Affiant says that the following disbursements have been made by and in behalf of plaintiff, and he claims that the same should be assessed as part of the costs herein:

Payment to Lawrence Lennon for reporting service and transcript of proceedings at hearing on January 15, 1930, as per statement attached, marked Exhibit A	$ 22.50
Payment to Lawrence Lennon for one-half cost of reporting service and one-half cost of original transcript of proceedings on hearing commenced November 12, 1930, as per statement attached, marked Exhibit B	125.00
Payment to Lawrence Lennon for one-half of reporting service and one-half of the cost of original transcript of proceedings at hearing on December 8, 1930, as per statement attached, marked Exhibit C	20.00
Payment to Lawrence Lennon for one-half of reporting service and one-half expense of original transcript of proceedings on hearing commencing December 22, 1930, as per statement attached, marked Exhibit D	66.00
Payment to Clarence J. Taylor for witness fees and mileage as taxed by the clerk of this court, as per slip marked Exhibit E, showing receipt by said witness	9.90
Payment to R. L. Christian for witness fees and mileage, as taxed by the clerk of this court, as per slip marked Exhibit F, showing receipt by said witness	13.30
Payment to John A. Nester for witness fees and mileage, as taxed by the clerk of this court, as per slip marked Exhibit G, showing receipt by said witness	13.30
Payment to A. A. Ruffing for witness fees and mileage, as taxed by the clerk of this court, as per slip marked Exhibit H, showing receipt by said witness	7.80

Payment to L. B. Fauver for witness fees and mileage, as taxed by the clerk of this court, as per slip marked Exhibit I, showing receipt by said witness..... 12.80

Payment to L. J. Wolf for witness fees and mileage, as taxed by the clerk of this court, as per slip marked Exhibit J, showing receipt by said witness 13.30

Payment to D. E. Turkle for witness fees and mileage, as taxed by the clerk of this court, as per slip marked Exhibit K, showing receipt by said witness..... 14.00

Payment to William Purcell for taking and transcribing deposition of Burton P. Foster, as per statement attached hereto, marked Exhibit L 24.00

$341.90

Earl F. Boxell.

Sworn to before me and subscribed in my presence this 21st day of November, 1931.

Pauline Odom,
(Seal) Notary Public, Lucas County, Ohio.
My commission expires October 11, 1932.

Service of a copy of the foregoing acknowledged this 21st day of November, 1931.

W. A. Eversman,
Per H. C. L. Solicitors for Defendant.

EXHIBIT A

LAWRENCE LENNON
Reporter United States District Court

Toledo, Ohio, January 20, 1930.

Messrs. Tracy, Chapman & Welles,
Ohio Building, Toledo, Ohio.

In the matter of The Equitable Trust Company of New York vs. City of Norwalk, Ohio; Equity, No. 1040.

Proceedings of January 15, 1930:

Reporting service .....$ 7.50
Transcript of proceedings; 30 pp. @ 50c..... 15.00

$22.50

Paid, February 10, 1930. Check No.....

EXHIBIT B

LAWRENCE LENNON
Reporter United States District Court

Toledo, Ohio, December 6, 1930.

Messrs. Tracy, Chapman & Welles,
Ohio Bank Building, Toledo, Ohio.

In the matter of The Equitable Trust Company of New York vs. City of Norwalk, Ohio; Equity, 1040:

Proceedings upon hearing for a preliminary injunction, commencing November 12, 1930:

One-half cost of per diem reporting service, 4 days @ $15.00—$60.00	$ 30.00
One-half cost of original transcript of proceedings filed with court; 380 pps. @ 50c—$190.00	95.00
Two complete copies of transcript furnished counsel; 380 pps. @ 25c—$95.00 each	190.00
	$315.00

Payment received.

Lawrence Lennon.

EXHIBIT C

LAWRENCE LENNON
Reporter United States District Court

Toledo, Ohio, December 13, 1930.

Messrs. Tracy, Chapman & Welles,
Ohio Bank Building, Toledo, Ohio.

In the matter of The Equitable Trust Company of New York vs. City of Norwalk, Ohio; Equity, 1040.

Proceedings upon hearing for a preliminary injunction, December 8, 1930:

One-half expense of reporting service, $10.00	$ 5.00
One-half cost of original transcript of proceedings filed with court; 60 pps. @ 50c—$30.00	15.00
Two complete copies of transcript; 60 pps. @ 25c—$15.00 each, furnished counsel	30.00
	$50.00

Received payment.

Lawrence Lennon.

EXHIBIT D

LAWRENCE LENNON
Reporter United States District Court

Toledo, Ohio, January 14, 1931.

Messrs. Tracy, Chapman & Welles,
Ohio Bank Building, Toledo, Ohio.

In the matter of The Equitable Trust Company of New York vs. City of Norwalk, Ohio; Equity, 1040: Arguments of Counsel, December 22, 1930, upon hearing of motion for a preliminary injunction:

One-half expense of reporting service, two days—$30.00	$ 15.00
One-half expense original transcript filed with court; 170 pps. @ 60c—$102.00	51.00
Expense of two complete copies furnished counsel; 170 pps. @ 30c—$51.00 each	102.00
	$168.00

Received payment.

Lawrence Lennon.

EXHIBIT E

United States District Court
Northern District of Ohio
No. 1040 Equity

Chase National Bank of N. Y.
vs.
The City of Norwalk.

It Is Hereby Certified, That Clarence J. Taylor, Lima, Ohio, has attended as a witness on behalf of the plaintiff, at the October term, 1930, and is entitled to the following fees, to-wit:

Per diem, day	$2.00
Mileage	7.90
Total	$9.90

F. J. Denzler, Clerk,
By K. V. Wilson, Deputy Clerk.

Present to plaintiff for payment.

Witness fees can not be taxed against the adverse party unless they have been paid.

(See Rev. Stat., sec. 983.)

Indorsed: Received payment of the within stated witness fee.

Clarence G. Taylor.

EXHIBIT F

United States District Court
Northern District of Ohio
No. 1040 Equity

The Chase National Bank of N. Y.
vs.
The City of Norwalk, Ohio.

It Is Hereby Certified, That R. L. Christian, Cleveland, Ohio, has attended as a witness on behalf of the plaintiff, at the October term, 1930, and is entitled to the following fees, to-wit:

Per diem, day	$ 2.00
Mileage	11.30
Total	$13.30

F. J. Denzler, Clerk,
By George H. Blossom, Deputy Clerk.

Present to plaintiff for payment.

Witness fees can not be taxed against the adverse party unless they have been paid.

(See Rev. Stat., sec 983)

Indorsed: Received payment of the within stated witness fee.

R. L. Christian.

EXHIBIT G

United States District Court
Northern District of Ohio
No. 1040 Equity

The Chase National Bank of N. Y.
vs.
The City of Norwalk, Ohio.

It Is Hereby Certified, That John A. Nester, Lakewood, Ohio, has attended as a witness on behalf of the plaintiff, at the October term, 1930, and is entitled to the following fees, to-wit:

Per diem, day	$ 2.00
Mileage	11.30
Total	$13.30

F. J. Denzler, Clerk,
By George H. Blossom, Deputy Clerk.

Present to plaintiff for payment.

Witness fees can not be taxed against the adverse party unless they have been paid.

(See Rev. Stat., sec 983)

Indorsed: Received payment of the within stated witness fee.

J. A. Nester.

EXHIBIT H

United States District Court
Northern District of Ohio
No. 1040 Equity

The Chase National Bank of N. Y.

vs.

The City of Norwalk, Ohio.

It Is Hereby Certified, That A. A. Ruffing, Norwalk, Ohio, has attended as a witness on behalf of the plaintiff, at the October term, 1930, and is entitled to the following fees, to-wit:

Per diem, day	$ 2.00
Mileage	5.80
Total	$ 7.80

F. J. Denzler, Clerk,
By George H. Blossom, Deputy Clerk.

Present to plaintiff for payment.

Witness fees can not be taxed against the adverse party unless they have been paid.

(See Rev. Stat., sec 983)

Indorsed: Received payment of the within stated witness fee.

A. A. Ruffing.

EXHIBIT I

United States District Court
Northern District of Ohio
No. 1040 Equity

The Chase National Bank of N. Y.
vs.
The City of Norwalk, Ohio.

It Is Hereby Certified, That L. B. Fauver, Elyria, Ohio, has attended as a witness on behalf of the plaintiff, at the October term, 1930, and is entitled to the following fees, to-wit:

Per diem, day	$ 4.00
Mileage	8.80
Total	$12.80

F. J. Denzler, Clerk,
By George H. Blossom, Deputy Clerk.

Present to plaintiff for payment.

Witness fees can not be taxed against the adverse party unless they have been paid.

(See Rev. Stat., sec 983)

Indorsed: Received payment of the within stated witness fee.

L. B. Fauver.

EXHIBIT J

United States District Court
Northern District of Ohio
No. 1040 Equity

The Chase National Bank of N. Y.
vs.
The City of Norwalk, Ohio.

It Is Hereby Certified, That L. J. Wolf, Cleveland, Ohio, has attended as a witness on behalf of the plaintiff, at the October term, 1930, and is entitled to the following fees, to-wit:

Per diem, day	$ 2.00
Mileage	11.30
Total	$13.30

F. J. Denzler, Clerk,
By George H. Blossom, Deputy Clerk.

Present to plaintiff for payment.

Witness fees can not be taxed against the adverse party unless they have been paid.

(See Rev. Stat., sec 983)

Indorsed: Received payment of the within stated witness fee.

L. J. Wolf.

EXHIBIT K

United States District Court
Northern District of Ohio
No. 1040 Equity

Chase National Bank of City of N. Y.
vs.
The City of Norwalk, Ohio.

It Is Hereby Certified, That D. E. Turkle, Bad Axe, Michigan, has attended as a witness on behalf of the plaintiff, at the October term, 1930, and is entitled to the following fees, to-wit:

Per diem, day	$ 4.00
Mileage	10.00
Total	$14.00

F. J. Denzler, Clerk,
By George H. Blossom, Deputy Clerk.

Present to plaintiff for payment.

Witness fees can not be taxed against the adverse party unless they have been paid.

(See Rev. Stat., sec 983)

Indorsed: Received payment of the within stated witness fee.

D. E. Turkle.

EXHIBIT L

WILLIAM PURCELL
General Shorthand Reporter
Suite 529-534 Nasby Bldg.
Phone, MAin 0818

In Account with
Tracy, Chapman & Welles,
1002 Ohio Bldg.

Toledo, Ohio, July 3, 1930.

Taking and transcribing deposition of Burton P. Foster in the case of The Equitable Trust Company of New York vs. The City of Norwalk, Ohio.

Original, 96 folios @ 25c	$24.00
Two Carbons, 192 folios @ 10c	19.20
	$43.20

Paid July 10, 1930. Check No.....

ORDER EXTENDING TIME

(Filed Dec. 15, 1931)

It is hereby ordered that the time for the defendant to complete its record and file the same and for the making of the clerk's return to the citation on defendant's appeal in this case in the United States Circuit Court of Appeals, pursuant to the appeal sued by the defendant, is hereby extended to and including January 11, 1932.

Geo. P. Hahn,
District Judge.

Dated December 14, 1931.

Approved:

Earl F. Boxell,
Of Counsel for the Plaintiff-Appellee.

STIPULATION RE CERTIFICATION OF THE RECORD

(Filed Dec. 31, 1931)

In accordance with Section 7 of Rule 44 of the General Rules of this court, it is stipulated and agreed that the record as presented to the clerk by the printer upon comparison by counsel may be certified by the clerk, as required by the rules of this court and the rules of the Circuit Court of Appeals, as a true, full, and complete copy of the original pleadings, papers, and orders used in the trial of this suit, as set forth in the praecipe for transcript and narrative form of testimony without further comparison by the clerk.

Dated December 31, 1931.

Earl F. Boxell,
Of Counsel for the Plaintiff-Appellee, The Chase National Bank of the City of New York:

W. A. Eversman,
Of Counsel for the Defendant-Appellant, The City of Norwalk.

ORDER

(Filed Dec. 31, 1931)

It is hereby ordered that in the preparation of the printed transcript of record on appeal in this cause the defendant shall omit therefrom those parts of Plaintiff's Exhibits 17, 27, 27½, and 28 which are marked "omit."

It is further ordered that Plaintiff's Exhibits 48, 49, 50, 72, 73, 74, and 75, and Defendant's Exhibits R, S, and C shall not be printed in said transcript of record on appeal.

It is further ordered that Plaintiff's Exhibits 17, 27, 27½, 28, 48, 49, 50, 72, 73, 74, and 75, and Defendant's Exhibits R, S, and C shall be sent by the clerk of this court to the Circuit Court of Appeals as physical exhibits to accompany the printed transcript of record on appeal, pursuant to Section 6 of Rule 15 of the Rules of the Circuit Court of Appeals of this Circuit.

It is further ordered that all other exhibits admitted at the hearing in this case shall be printed in the transcript of record on appeal and that Exhibit No. 6 attached to the deposition of Charles Suhr shall be given the numbering "Defendant's Exhibit U" in said printed transcript of record.

Geo. P. Hahn, Judge.

Dated December 31, 1931.

Approved:

Earl F. Boxell,
Of Counsel for the Plaintiff-Appellee, The Chase National Bank of the City of New York.

W. A. Eversman,
Of Counsel for the Defendant-Appellant, The City of Norwalk.

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL

(Filed Oct. 24, 1931)

To the Clerk:

Please prepare transcript of record in the above entitled suit to be filed in the United States Circuit Court of Appeals for the Sixth Circuit, pursuant to an appeal allowed in the said suit, and include in said transcript of record the following papers and orders:

1. Title page.
2. Caption.
3. Plaintiff's bill of complaint.
4. Amendment and supplement to plaintiff's bill of complaint.
5. Affidavit of Earl F. Boxell.
6. Temporary restraining order.
7. Bond.
8. Order continuing temporary restraining order for ten days, filed January 18, 1930.
9. Order continuing temporary restraining order until final hearing.

9a. Motion to substitute Chase National Bank of the City of New York as party plaintiff.

10. Order allowing The Chase National Bank of the City of New York to be substituted as party plaintiff.
11. Second amendment and supplement to plaintiff's bill of complaint.
12. Defendant's answer.
13. Third amendment and supplement to plaintiff's bill of complaint.
14. Defendant's answer to third amendment and supplement to plaintiff's bill of complaint.
15. Narrative statement of evidence and order approving same.

15a. Order in re exhibits.

16. Memorandum opinion of the Honorable George P. Hahn, judge.
17. Final decree, entered and filed June 27, 1931.
18. Defendant's petition for appeal, entered and filed July 25, 1931.
19. Defendant's assignment of errors, entered and filed July 25, 1931.
20. Order allowing appeal and fixing amount of bond, entered and filed July 25, 1931.
21. Copy of citation and acknowledgment of service thereof by the plaintiff, The Chase National Bank of the City of New York.

22. Order extending time for the lodging of the narrative statement of testimony to September 4, 1931, and for filing the transcript of record in the Circuit Court of Appeals to October 4, 1931.

23. Bond on appeal filed by the defendant and approved by Honorable George P. Hahn, judge, August 24, 1931.

24. Order extending time for the lodging of the narrative statement of testimony to September 30, 1931, and for the filing of the transcript of record in the Circuit Court of Appeals and for making return on citation to October 30, 1931.

25. Orders, if any, entered subsequently hereto, extending time for filing the transcript in the Circuit Court of Appeals and making return on the citation to the Circuit Court of Appeals, and extending time for filing objections and amendments to narrative and for filing plaintiff's counter praecipe.

26. This praecipe for transcript of record on appeal.

27. Stipulation between attorneys for the parties relative to certification of the record and all other stipulations between attorneys for the parties hereafter filed relative to the record on appeal.

29. Plaintiff's affidavit upon taxation of costs.

30. Defendant's affidavit upon taxation of costs.

28. Clerk's certificate.

Please deliver papers to the H. J. Chittenden Company, Toledo, Ohio, for printing.

G. Ray Craig,
E. G. Martin,
W. A. Eversman,
Attorneys for City of Norwalk, Ohio,
Defendant-Appellant.

NOTICE OF PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL

(Filed Oct. 24, 1931)

To Messrs. Tracy, Chapman & Welles, George D. Welles, and Earl F. Boxell, Attorneys for Plaintiff, The Chase National Bank of the City of New York:

You are hereby notified that the defendant in the above entitled suit will file forthwith the foregoing praecipe indicating the portions of the record it desires to have incorporated into the transcript of record on appeal.

G. Ray Craig,
E. G. Martin,
W. A. Eversman,
Attorneys for the Defendant, City of Norwalk.

October 24, 1931.

Service and receipt of copies of the foregoing notice and praecipe are acknowledged on behalf of the plaintiff, The Chase National Bank of the City of New York, this 24th day of October, 1931.

Tracy, Chapman & Welles,
Of Attorneys for Said Plaintiff.

ORDER EXTENDING TIME

(Filed Jan. 4, 1932)

It is hereby ordered that the time for the defendant to complete its record and file the same and for the making of the clerk's return to the citation on defendant's appeal in this case in the United States Circuit Court of Appeals, pursuant to the appeal sued by the defendant, is hereby extended to and including February 11, 1932.

Geo. P. Hahn,
District Judge.

Dated January 4, 1932.

Approved:

Earl F. Boxell,
Of Counsel for the Plaintiff-Appellee.